TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

No. 563

THE UNITED STATES OF AMERICA, PETITIONER

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 6, 1937
CERTIORARI GRANTED DECEMBER 6, 1937

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TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO WIT:

At a District Court of the United States for the District of Maryland, begun and held in the City of Baltimore on the First Tuesday in December (being the 1st day of the same month) in the year of our Lord one thousand nine hundred and thirty-six.

Present: The Honorable W. Calvin Chesnut, Judge Maryland District; Bernard J. Flynn, Esq., Attorney; August Klecka, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to wit:

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Inc.),

vs.

United States of America.

} No. 5419 Law.

DECLARATION AS AMENDED.

Filed 11th July, 1934.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Inc.),
Plaintiff,

vs.

United States of America,
Defendant.

No. 5419 Law.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Incorporated), a citizen of the United States and a resident of Baltimore, Maryland, by Joseph Addison, William R. Semans and Barton, Wilmer, Ambler & Barton, his attorneys, sues the United States of America:

For money payable by the defendant to the plaintiff,

1. And for money received by the defendant for the use of the plaintiff.

2. And for that this is a suit of a civil nature at law, arising under the laws of the United States providing for internal revenue and the collection thereof, and that the cause of action here sued upon arose in the Judicial District of Maryland and within the jurisdiction of this Court in that the cause of action is for the recovery of internal revenue tax erroneously and illegally assessed by and paid to Galen L. Tait, an individual, formerly Collector of Internal Revenue of the United States of America for the District of Maryland, and at the time of the filing of this suit not in office as said Collector of Internal Revenue.

That on or about the 21st day of May, 1929, Hendler Creamery Company, Incorporated (later by change of

name Creameries, Inc.), entered into a contract of reorganization with The Borden Company in the following words, to wit:

"350 Madison Avenue, New York, N. Y.

May 21, 1929.

Hendler Creamery Company, Incorporated,

Baltimore, Maryland.

Dear Sirs:

We write to confirm the various understandings reached at conferences heretofore held between your and our respective officers:

FIRST: We are advised by you and, by your acceptance hereof, you unconditionally represent and agree to and with us as follows:

You are a corporation duly organized and now existing and in good standing under the laws of the State of Maryland.

You have an authorized capital stock consisting of Thirty thousand (30,000) shares of Prior Preference Stock, of the par value of One hundred dollars ($100.) per share and the aggregate par value of Three million dollars ($3,000,000.); Twenty thousand (20,000) shares of Preferred Stock, without par value; and Thirty thousand (30,000) shares of Common Stock, without par value. Of said authorized classes of Capital Stock there have been respectively issued and are now outstanding 14,340 shares of Prior Preferred Stock of the aggregate par value of One million, four hundred thirty-four thousand Dollars ($1,434,000.00); Twenty thousand (20,000) shares of Preferred Stock; and Thirty thousand (30,000) shares of Common Stock. Said Prior Preference Stock bears annual dividends of Seven per cent (7%), payable January 1st, April 1st, July 1st and October 1st in each year. It is subject to redemption on any quarterly dividend date at One hundred seven and 50/100 dollars ($107.50) per share and an amount equal to all accrued and unpaid quarterly dividends thereon, upon thirty (30) days' written notice, and the holders thereof are entitled to receive One hundred dollars ($100.) per share and an

amount equal to the amount of dividends accumulated and unpaid thereon on dissolution of your Company. All dividends on the said Prior Preference Stock have been paid to and including that due April 1, 1929.

The Preferred Stock bears non-cumulative dividends of One and 75/100 dollars ($1.75) per share per annum, payable on January 1st, April 1st, July 1st and October 1st in each year. After the entire issue of Prior Preference Stock shall have been redeemed or provision made therefor, and after all funded debt of the Corporation has been retired or provision made therefor, the Preferred Stock is subject to redemption on any dividend date at the price of Twenty-six and 25/100 dollars ($26.25) per share and an amount equal to all actually declared and unpaid dividends thereon, on thirty (30) days' written notice, and the holders thereof are entitled, on dissolution of your Company and subject to the preferences of the holders of any Prior Preference Stock then outstanding, to receive Twenty-five dollars ($25.) per share and an amount equal to the amount of all dividends actually declared prior to such dissolution and unpaid. All dividends actually declared on the said Preferred Stock have been paid to and including that due April 1, 1929.

Your Company has no bonds, mortgages or funded debt authorized or outstanding, except Six Hundred seventy-five thousand dollars ($675,000) principal amount of First Mortgage 6% Convertible Twenty Year Gold Bonds heretofore issued under an indenture of mortgage dated July 1, 1926, made to Commonwealth Bank of Baltimore as Trustee, to secure an authorized issue aggregating not more than One Million Dollars ($1,000,000) of said bonds. The said bonds are convertible into Prior Preference Stock of your Company in the ratio of one share of said Prior Preference Stock for each One hundred dollars ($100) principal amount of said bonds. Such conversion may be effected at any time prior to maturity or, if the bonds be called for redemption, at any time before the day of the adoption of proper resolutions for the call of said bonds. Said bonds are subject to redemption on any interest payment date, on thirty (30) days previous notice, at the price, if the bonds are redeemed on or prior to December 31, 1929, of 107½% of their principal amount plus accrued interest. The interest dates on said bonds are

January 1st and July 1st in each year and all interest on said bonds has been paid up to and including January 1, 1929.

You or one of your subsidiary companies own the entire issued and outstanding capital stock of the following corporations, all of which are duly organized, now existing and in good standing under the laws of the State of Maryland: The Clover Ice Cream Company, the Horn Ice Cream Company and the Supreme Ice Cream Company. The entire captial stock of the Supreme Ice Cream Company was acquired by your Company since December 31, 1928, in exchange for Two thousand three hundred fifty (2,350) shares of the Prior Preference Stock of your Company.

The said Clover Ice Cream Company has an authorized capital stock consisting of twelve hundred fifty (1250) shares without par value, of which there are issued and outstanding one thousand (1000) shares, all of which are owned by the Horn Ice Cream Company. It has no bonds, mortgages or other funded debt.

The said Supreme Ice Cream Company has an authorized capital stock consisting of five thousand (5000) shares of common stock without par value, all of which are issued and outstanding, and five thousand (5000) shares of preferred stock of the par value of $100 per share. There is no preferred stock of said Company now outstanding; all of the preferred stock heretofore issued having been retired. All of the common stock of said company is owned by your Company. It has no bonds, mortgages or other funded debt.

The said Horn Ice Cream Company has an authorized capital stock consisting of one hundred thousand (100,000) shares without par value, of which there are issued and outstanding ten thousand (10,000) shares, all of which are owned by your Company. The said Horn Ice Cream Company acquired subsequently to December 31, 1928 the Baltimore plant and the Baltimore business of Southern Dairies, Inc., including inventories and accounts receivable, for the sum of approximately One million one hundred sixty-six thousand dollars ($1,166,000) in cash. It has no bonds, mortgages or other funded debt.

As herein used the terms "you" or "your Company" mean Hendler Creamery Company, Incorporated. The term "subsidiary companies" refers to the Clover Ice Cream Company, the Horn Ice Cream Company and the Supreme Ice Cream Company, and the term "your companies" refers to the Hendler Creamery Company, Incorporated and the said subsidiary companies collectively.

SECOND. We hereby make you the following proposition:

You shall assign and transfer to us and we shall purchase from you, pursuant to the plan of reorganization evidenced hereby, your entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as your business as a going concern, your trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), your trademarks, patents, patent rights and good will. The said property and assets are to include the entire issued and outstanding capital stock of each of the subsidiary companies, but should we so request, you shall, in lieu of conveying to us the said stock, cause each of the said subsidiary companies, or such one or ones of them as we may request, to transfer and convey to us its entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the corporate name of such subsidiary company), its trade-marks, patents, patent rights and good will.

However, if any shares of the capital stock of your Company are held by it in its treasury, such shares shall not be included among the assets to be conveyed to us pursuant hereto.

You shall effect a reorganization so that in exchange for the assignment, transfer and conveyance to us of your said assets and business and, should we so elect, of the assets and business of the subsidiary companies, or any of them, we will:

(a) Issue and deliver to your Company or upon its order the certificates for Eighty-six thousand seven hundred sixteen (86,716) shares of the full paid and non-assessable capital stock of our Company, of the par value of $25 per

share and the aggregate par value of Two million one hundred sixty-seven thousand nine hundred dollars ($2,167,900) duly listed on the New York Stock Exchange and constituting part of the authorized capital stock of our Company. On April 17, 1929 the stockholders of our Company approved a change in the par value of the shares of our capital stock, from Fifty dollars ($50) each to Twenty-five dollars ($25) each, and a corresponding increase in the authorized number of said shares, so that the total authorized amount of our capital stock remains unchanged at One hundred million dollars ($100,000,000) all of one class. We reserve the right to increase our authorized capital stock to Two hundred million dollars ($200,000,000) it being understood, however, that prior to the closing of title to us, we will not issue additional shares of our capital stock except as contemplated by this agreement and except for property acquired and/or services rendered as permitted by the laws of New Jersey.

(b) Provide for the liquidation of the said outstanding fourteen thousand, three hundred and forty (14,340) shares of your Prior Preference Stock (plus such shares of Prior Preference Stock as may be issued after the date hereof and prior to May 21, 1929 upon the conversion of the said First Mortgage Bonds of your Company) at the option of the holders thereof either (1) by payment of the sum of $107.50 per share plus an amount equal to the accrued and unpaid dividends thereon at the rate of Seven Dollars ($7) per share per annum accumulated to the date of the closing of title to us hereunder or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (2) by the issuance of four shares of our said full paid and non-assessable capital stock, of the par value of $25 per share, in exchange for every three shares of your Prior Preference Stock; provided, however, that we shall not be required in any event to issue fractional shares of our capital stock and that as to any holder of your Prior Preference Stock whose holdings are not divisible by three, we shall have the right to make adjustment for the odd share or shares, as follows: For each three-fourths of a share not so divisible, one full share of Borden Company stock will be

issued, and for the remaining one-fourth of a share, the Prior Preference Stockholder will receive in cash one-fourth of the redemption price of the whole share, to wit, the sum of Twenty-six and 88/100 dollars ($26.88) plus one-fourth of the accrued dividend on such share figured in the manner provided in and by subdivision (1) above; and provided further that we shall, at least five days prior to the date fixed for closing of title to us hereunder, receive from your Company in writing a notice of the number of shares of our capital stock to be issued in liquidation of your Prior Preference Stock, pursuant to subdivision (b) of this Section Second hereof and of the names and the respective number of shares for which certificates therefor will be required by you. All holders of your Prior Preference Stock who shall not elect to receive shares of our capital stock in liquidation at least by June 14th prior to closing of title to us hereunder shall be conclusively deemed to have waived their right to receive our capital stock. Suitable arrangements shall be made by you (which arrangements shall be subject to the approval of our counsel, Messrs. Masten & Nichols) for the appointment of a responsible bank or trust company as your agent for the liquidation or redemption of your Prior Preference Stock, and all holders of such Prior Preference Stock who shall elect to take stock of our Company under clause (2) above shall be required to deposit their Prior Preference Stock certificates with said liquidating or redemption agent. All payments of cash and deliveries of our stock called for by clauses (1) and (2) above shall be made, at or before the closing of title to us hereunder, to said liquidating or redemption agent for the account of the several holders of your Prior Preference Stock as their respective interests may appear; provided, however, that for the purpose of the closing of title, said payments of cash and delivery of stock may be made to the correspondent in the City of New York of said liquidating or redemption agent. The cash so to be paid by us shall include accrued dividends to July 1, 1929 on all Prior Preference Stock of your Company the holders of which have not elected to receive Borden Company stock, it being understood that in the event any such Prior Preference Stockholder shall deposit the certificates for his Prior Preference Stock prior to July 1, 1929, a s[illegible] equal to the accrued dividends on said stock from the [illegible] of such deposit, or from the date of closing of title t[illegible] if he has

deposited his stock prior thereto, to July 1, 1929 shall be returned to us by the liquidating or redemption agent. The cash so paid to the liquidating or redemption agent shall be applied to the liquidation and/or redemption of all of the Prior Preference Stock of your Company the holders of which shall not have elected to receive the stock of our Company, and for no other purpose. Payments of cash and/or deliveries of our stock shall be made by such liquidating or redemption agent to the respective Prior Preference Stockholders only against the surrender for cancellation of their respective stock certificates for said Prior Preference Stock properly endorsed.

(c) Assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder, it being understood that the liabilities so assumed by us shall not include (1) any capital stock liability; (2) any income or excess profits taxes incurred by your Company or by either or any of the said subsidiary companies by reason of the conveyance of its assets and business to us hereunder; (3) any tax incurred by your Company or by any subsidiary company whose property and business we may elect to take in respect of business transacted by you or by any such subsidiary company and/or income accrued to you or to any subsidiary company subsequent to the closing of title to us hereunder; (4) any additional income and/or excess profits taxes now or hereafter imposed upon your Company or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1929 ; or (5) the legal fees of counsel for your companies in connection with this contract and the transfer hereby provided for and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of your Company. All of said excepted liabilities shall be borne by you or your stockholders.

As used herein the phrase "closing of title to us" shall mean the time at which we receive the conveyance to us of the properties and business of your Company.

The certificates for the shares of the capital stock of your subsidiary companies, in the event such certificates are delivered to us pursuant hereto, shall be duly endorsed in blank for transfer and in negotiable form and

shall bear all necessary Internal Revenue stock transfer and other stamps.

THIRD. The foregoing offer and, in the event of your acceptance thereof, our obligation to complete and perform the same, is, however, subject to the following conditions precedent and to your obligations hereinafter specified, which conditions and obligations by your acceptance hereof you shall and do agree fully to comply with, observe and perform.

A. You have submitted to us balance sheets of your Company and of each of the subsidiary companies as of December 31, 1928, and profit and loss accounts of your Company, of the Horn Ice Cream Company or its predecessors in title and of the Supreme Ice Cream Company, for the calendar years 1926, 1927 and 1928, and a profit and loss account of the Clover Ice Cream Company for the last eleven months of 1928. Said balance sheets and profit and loss accounts have been identified by the signature of your Treasurer and are expressly made a part of the agreement embodied in this letter and your acceptance thereof. You represent and unconditionally agree and guarantee to us:

(a) That since the 31st day of December, 1928, and until closing of title to us hereunder, there has been and will be no change in the condition or value of the assets, property and business of your Company and/or of the Clover Ice Cream Company or in the net worth thereof as shown by the said balance sheets of said companies of December 31, 1928 and that said companies since December 31, 1928 have made and will make no disbursements or other disposition of property except such changes, disbursements and dispositions of property as are incidental to the ordinary and regular course of their respective businesses or such as are herein expressly permitted, and excepting also money borrowed and/or paid and stock issued to acquire the stock of Supreme Ice Cream Company and the Baltimore Plant of Southern Dairies, Inc., stock issued on conversion of First Mortgage Bonds of your Company and money borrowed and/or paid out by your Company to purchase or redeem its First Mortgage Bonds and excepting also monies loaned to your subsidiary companies.

(b) That since the respective dates when your Company acquired the stock of Supreme Ice Cream Company and Horn Ice Cream Company acquired the Baltimore plant of Southern Dairies, Inc., and until closing of title to us hereunder there has been and will be no change in the condition or value of the assets, property and business of Horn Ice Cream Company and/or Supreme Ice Cream Company, or in the net worth of said companies, and that said companies since said respective dates have made and will make no disbursements or other dispositions of property, except such changes, disbursements and dispositions of property as are incidental to the ordinary and regular course of their respective businesses or such as are herein expressly permitted.

(c) That until closing of title to us hereunder your companies will each conduct its business in the usual and ordinary course, will take the same care as heretofore of its business, good will and customers, and will not, without our previous written consent, make any change in its corporate structure, issue any shares of its capital stock (except Prior Preference Stock of your Company issued prior to May 21, 1929, on conversion of any of your Company's First Mortgage Bonds), create any mortgage, issue any bonds, incur any indebtedness or make any expenditures, enter into any contracts or make any other commitments except such as are incidental to the ordinary and regular conduct of its business and its current operations and requirements or such as are herein expressly permitted.

(d) That since December 31, 1928, in the case of your Company and Clover Ice Cream Company, and since the date when you acquired its capital stock in the case of the Supreme Ice Cream Company, and since the date when it acquired the Baltimore plant of Southern Dairies, Inc., in the case of Horn Ice Cream Company, your companies have not declared or paid any dividends and that until closing of title to us hereunder your companies will not declare or pay any dividends or make any other distribution to their stockholders of any class, excepting the regular dividend on the Prior Preference Stock of your Company at the regular dates therefor.

(e) That if, prior to closing of title to us hereunder, any question of more than ordinary importance shall

arise in connection with the business of your companies or any of them, you will consult us with respect thereto before a decision is reached or action taken thereon by you.

B. Upon your acceptance of this offer, you shall take all such proceedings as shall be necessary to call your outstanding Prior Preference Stock for redemption on July 1, 1929, and all such proceedings as shall be necessary to call your outstanding First Mortgage 6% Convertible Gold Bonds for redemption on July 1, 1929. All such proceedings shall be in manner and form agreeable to counsel for your Company and approved by Masten & Nichols. Proper resolutions calling the said First Mortgage Bonds for redemption shall be adopted not later than May 21, 1929. At or prior to the closing of title to us the said mortgage will be satisfied as provided by Section 3 of Article IV thereof, and we shall be furnished with a satisfaction piece at the closing.

C. We have examined the titles to the real estate of your companies, the proceedings taken by your companies for their organization and the issuance of their capital stocks, and are prepared to approve the same, it being understood that you are to use your best efforts to cure insofar as it may be practicable such defects as our investigation has disclosed. Our obligation to close hereunder, however, is subject to our receiving from Messrs. Masten & Nichols, our attorneys of New York City, their favorable opinion as to the sufficiency, legality and regularity of all proceedings of the directors and stockholders of your companies taken for the purpose of carrying out the agreement embodied in this letter and your acceptance thereof, including amongst other things (a) the conveyance to us of the assets and business of your Company and of any subsidiary company, if we request the conveyance to us of all the property and business of any subsidiary company; (b) the proceedings taken for the calling for redemption of the Prior Preference Stock and First Mortgage Bonds of your Company as herein provided.

D. You unconditionally guarantee and agree that all taxes and assessments imposed upon your Company and Clover Ice Cream Company, or upon the income or profits or property thereof by the United States Government or

by the State of Maryland or by any state, municipality or other taxing authority have been fully paid, excepting only current taxes and/or assessments not yet due, and that adequate reserves have been set aside and/or accruals made for all the aforesaid excepted taxes and assessments which have been imposed or assessed prior to January 1, 1929. To the best of your knowledge and belief all such taxes and assessments imposed upon the Horn Ice Cream Company or its predecessors in title and Supreme Ice Cream Company have likewise been paid. There are to your knowledge no unsettled claims in respect to any such taxes and/or assessments and that the Federal income and excess profits tax reports of your companies have been audited and adjusted up to and including the reports filed in respect of the year ended December 31, 1926. You shall, pending the closing of title to us hereunder, furnish to us, our agents and attorneys, all such powers of attorney and authorizations as we shall request to enable us or them to make full inquiry as to the status of all such matters whether before the Income Tax Unit of the United States Treasury Department or any other governmental authority having jurisdiction.

E. You represent and unconditionally guarantee that none of your companies is a party to any contract, oral, written or implied, with any person or party whomsoever, except such as have been or will be made in the regular course of business.

F. You represent and unconditionally guarantee (a) that none of your companies is a party to any suit or other litigation except the usual so-called "accident suits", all of which accident suits are fully covered by insurance and are handled on your behalf by reliable insurance companies, except that no insurance is carried to cover claims arising from the presence of foreign matter in your products, and (b) that neither your Company, Clover Ice Cream Company nor Horn Ice Cream Company has, at the date hereof, or will have at the closing of title to us hereunder any obligation or liability, whether contractual or otherwise, and whether direct or contingent, except such as are shown upon the said balance sheets of said companies, dated December 31, 1928, or are incurred since said date in the usual and regular course of business, or as may be expressly permitted by

the terms of this agreement and that to the best of your knowledge and belief the Supreme Ice Cream Company has not at the date hereof and will not have at the closing of title to us hereunder any obligation or liability, whether contractual or otherwise and whether direct or contingent, except such as are shown upon its said balance sheet of December 31, 1928, or are incurred since said date in the usual and regular course of business, and except money borrowed to retire its Preferred Stock and to satisfy the mortgage upon its properties, and except such as may be expressly permitted by the terms of this agreement.

G. You shall promptly furnish to our attorneys, Messrs. Masten & Nichols, all such certificates of counsel, original and certified copies of corporate proceedings, books and records and such other papers, information and data as they may from time to time reasonably request for the purpose of satisfying themselves as to any of the matters arising under the agreement evidenced by this letter and your acceptance thereof.

H. You shall promptly furnish to us or to such individuals as we may designate such information as we may from time to time reasonably require regarding the property and business of your companies, and will permit us or our said representatives to have all reasonable access to and the right to examine the books, records and accounts and plants and properties thereof.

I. All instruments of transfer and conveyance and all agreements and other papers to be delivered to us pursuant hereto shall be such as are specified by Messrs. Masten & Nichols, shall be such as they shall approve as to form, execution and sufficiency thereof, and the execution and delivery thereof shall be authorized by such proceedings of the directors and stockholders of your respective companies as Messrs. Masten & Nichols may deem necessary. All proceedings of the directors and stockholders of your respective companies in respect of the matters covered by the agreement between us shall be in such manner and form as are approved by Messrs. Masten & Nichols.

J. All buildings, machinery, equipment and other property of your companies are covered by insurance in reliable companies, and in the best judgment of your

Company, in adequate amounts, and you unconditionally guarantee and agree that all fire and other insurance now carried by each of your companies will be maintained by it and continued in full force and effect up to the closing of title to us hereunder.

K. At or before the closing of title to us hereunder you shall deliver to us an agreement executed by Messrs. L. Manuel Hendler and Nathan Lebovitz, in which they shall jointly and severally unconditionally guarantee to us that if within sixty days after the closing of title to us hereunder we shall receive an audit which shall be made at our expense, certified as correct by Messrs. Haskins & Sells, of the condition of the business and property taken over by us from your respective companies at the closing of title to us, and if such audit shall show any deficiency in any of the assets and/or any increase in any of the liabilities shown upon the said balance sheets of your Company and of Clover Ice Cream Company, of December 31, 1928, except such deficiencies of assets or increases of liabilities as are expressly permitted by the terms of the agreement embodied in this letter and your acceptance thereof or which shall have been incurred subsequently to December 31, 1928, in the regular course of business, then the said L. Manuel Hendler and Nathan Lebovitz will forthwith upon demand from us, jointly and severally make good and pay to us in cash the aggregate amount of any and all such deficiencies of assets and/or increase of liabilities; provided, however, that for the purposes of the audit to be made by them, it is understood that Messrs. Haskins & Sells shall not reopen or question the basis of valuation of the several items of assets shown on said balance sheets of your Company and Clover Ice Cream Company of December 31, 1928, and actually owned by said companies on that date.

Said L. Manuel Hendler and Nathan Lebovitz shall further jointly and severally unconditionally agree in and by said agreement that if the said audit of Haskins & Sells shall show any deficiency in any of the assets and/or increase in any of the liabilities of Horn Ice Cream Company and/or Supreme Ice Cream Company as the same existed on the respective dates when your Company acquired the stock of the said Supreme Ice Cream Company and said Horn Ice Cream Company acquired the Balti-

more plant of Southern Dairies, Inc., and such deficiencies of assets or increases of liabilities occurred subsequent to said respective dates and did not occur in the regular course of business and are not expressly permitted by this agreement, or, if the said audit of Messrs. Haskins & Sells shall show any increase in the liabilities of Supreme Ice Cream Company as shown on its said balance sheet of December 31, 1928, not incurred in the regular course of its business and not expressly permitted by this agreement, then the said L. Manuel Hendler and Nathan Lebovitz will forthwith upon demand from us jointly and severally make good and pay to us in cash the aggregate amount of any and all such deficiencies of assets and/or increases of liabilities.

L. At or before the closing of title to us hereunder you shall deliver to us (a) the several agreements of L. Manuel Hendler and Nathan Lebovitz, in which they shall agree that except in the employ of our Company or its subsidiaries they will not, for a period of five years next following the closing of title to us, either directly or indirectly engage in the business of the production, manufacture, distribution and sale of ice cream or other frozen products, or, without our written consent, be interested in or hold in or extend financial aid or assistance to any firm or corporation engaged in such business within the States of Maryland or Delaware, or in any other territory where the business of your Company and its subsidiaries is now being conducted; except that they may purchase for investment, capital stock or obligations of any corporation whose stock is listed on the New York Stock Exchange or any other recognized stock exchange; and (b) the several agreements of L. Manuel Hendler and Nathan Lebovitz, whereby they shall agree that they will forthwith enter and for the period of at least one year from the date of the closing of title to us hereunder continue in the service of our Company and/or of its subsidiaries and will during such term of employment devote their time and attention during all reasonable business hours exclusively to the performance of their duties as officers and/or employees of our Company or one of its subsidiary companies. The amount of cash salary to be specified in the last mentioned employment agreements shall be such as are satisfactory to each of the above named gentlemen, respectively and approved

by our President. The form and substance of the above agreements shall be such as are approved by Messrs. Masten & Nichols.

M. At or prior to the closing of title to us hereunder your Company shall take all such proceedings of its stockholders and directors, or otherwise, and shall file all such certificates and other papers as shall be necessary to change its corporate name to some other corporate name, in which the name "Hendler" shall not appear, and which shall be entirely dissimilar from the name "Hendler Creamery Company, Incorporated", it being the intent and purpose of this provision that, prior to the closing of title to us hereunder, we shall be at liberty to organize, if we see fit, a corporation under the laws of such state as we may desire under the name "Hendler Creamery Company, Incorporated", for the purpose of taking over and carrying on the business now conducted by your Company under the same name which it is now using, and you shall prior to closing of title to us hereunder, should we so request, take all such steps and proceedings as shall be necessary to enable us to organize or to qualify any such new corporation under such name in the State of Delaware, the State of Maryland, and in any other State or States where your Company is now licensed or is transacting business. In the event that we elect to take the property and business of any of the subsidiary companies, such subsidiary company shall also take such steps as we may request in relation to a change of its corporate name.

N. The conveyance of the assets and business to be made by your Company, and by any subsidiary company, if we so request, pursuant hereto shall, in the case of each company, cover and include (without in any way limiting or impairing by specific enumeration the scope, intent or effect of any general description herein contained) all and every the following: (a) all its real estate, leases, leasehold interests, plants, buildings, fixtures, furniture, machinery, tools, appliances, apparatus, equipment, supplies, stock, merchandise (raw, wrought and in process); accounts receivable, bills and notes receivable; (b) all of its business as a going concern, and all the good will and trade name thereof; (c) all of its patents, patent rights, trade-marks, trade names, the right to use

its present corporate name, inventions, labels, brands, copyrights, trade secrets, processes and formulae (duly certified), records and books (excepting its stock and stock transfer books), contracts, contract rights, muniments of title, customers' lists, unexpired insurance, insurance awards made or to be made, and prepaid taxes; (d) all shares of stock in subsidiary companies and all other securities owned by it except the stock of any of the three subsidiary companies hereinbefore named whose property and business we may elect to take; (e) all cash in hand and in bank and all other cash assets; (f) all claims against the United States or any State or Municipal Government or any officer, agent or employee thereof, for refund of taxes paid by it, or its predecessors in interest, and your Company, and any subsidiary (if it conveys its property and business to us), shall each agree to execute and deliver to us all such authorizations, powers of attorney, and other papers as shall be necessary to enable us to prosecute and collect upon such claims; and (g) all other rights, claims, demands, assets, property and effects, tangible and intangible, of every kind, nature and description, real, personal and mixed and wheresoever situated, belonging to it or to which it is entitled or in any way connected with the business owned or operated by it. If any of said leases under which your Company or any subsidiary company is tenant require the consent of the landlord to an assignment thereof, you agree that you will, at our request, in respect of any specified lease, use your best endeavors to secure such consent.

FOURTH. We will, prior to closing of title to us hereunder, furnish to you the opinion of Messrs. Masten & Nichols approving of the validity of the corporate organization of our Company and stating that upon the completion of the conveyances to us by your Company hereby called for, and by any subsidiary company if desired by us, the shares of our stock issued and delivered pursuant hereto will have been validly issued and be full paid and non-assessable. The United States Internal Revenue Stamp Tax upon the issuance of the said stock shall be paid by us.

FIFTH. Subject to the performance of the conditions hereinbefore specified, and to the full compliance by you

with all the representations herein set forth, closing of title to us hereunder shall take place, the deeds, assignments and other conveyances and agreements to us shall be delivered by you and the certificates for our stock shall be delivered by us to you and payment of all sums of money payable by us hereunder shall be made, at our office, No. 350 Madison Avenue, New York City, at ten o'clock in the forenoon, on June 21, 1929; provided, however, that either you or our Company may have such adjournment beyond June 21, 1929, as may be reasonably required to permit the completion of the title and other examinations, the taking of the necessary proceedings of stockholders and directors, etc.; and provided, further, that for income tax and accounting purposes the closing hereunder shall be as of the opening of business on April 1, 1929, but this shall not alter in any way the meaning of the term "closing of title to us" so far as concerns any of the agreements and guaranties hereinbefore contained. It being understood that our obligation to close hereunder is conditioned upon your ability to perform your agreements herein contained in respect of each of your companies and we shall not except at our option be obligated to close hereunder in respect of any of your companies unless simultaneously you are prepared to close in respect of all of your said companies.

SIXTH. At the closing of title to us you will deliver or cause to be delivered to us the written resignations of such officers, directors and members of committees of such of your subsidiary companies as we may request, such resignations to be satisfactory in form to us, and, if we so request, will cause to be held, either contemporaneously with the closing of title to us, or thereafter if we prefer, meetings of the Boards of Directors of such of your subsidiary companies as we may request, at which meetings will be accepted such respective resignations as we may desire to have accepted and at which meetings will be elected such respective successors to the persons whose resignations shall be so accepted as we may specify.

SEVENTH. Closing of title to us hereunder having duly taken place pursuant to the foregoing provisions of this letter, you shall thereupon, with all reasonable despatch, cause to be taken such steps as shall be necessary to complete the dissolution of your Company and also of

any subsidiary company whose property and business we may elect to take, and the distribution to the stockholders of your Company entitled thereto of the shares of the capital stock of our Company issued by us pursuant hereto. Said proceedings shall be taken by your attorneys but under the supervision of Messrs. Masten & Nichols.

EIGHTH. The offer hereby made has been duly authorized by our Board of Directors. It is understood that your acceptance hereof shall be duly authorized by suitable proceedings of the directors and stockholders of your Company.

NINTH. Any notice under this agreement shall be deemed to be sufficiently given and served for all purposes if sent by United States registered mail addressed as follows:

Notice to our Company shall be addressed:

Mr. Arthur W. Milburn,
c/o The Borden Company,
350 Madison Avenue,
New York, N. Y.

Notice to you shall be addressed:

Mr. L. Manuel Hendler,
c/o Hendler Creamery Company,
Incorporated,
Baltimore, Maryland.

TENTH. If the foregoing correctly states the understanding between you and us, will you kindly so indicate by signing the acceptance at the foot of the enclosed carbon copy of this letter and returning such accepted copy to us, and thereupon this letter and your said acceptance shall constitute the agreement between us.

THE BORDEN COMPANY.

By G. M. Waugh, Jr.,

Vice-President.

We hereby accept the offer contained in the foregoing letter to us from The Borden Company and agree to per-

form and be bound by the several terms, conditions and provisions thereof.

Dated: May 25th, 1929.

HENDLER CREAMERY COMPANY,
INCORPORATED.

By L. Manuel Hendler,
President.

In consideration of the benefits to accrue to us as stockholders of Hendler Creamery Company, Incorporated, the undersigned hereby assent to the foregoing agreement and agree to do and perform, as individuals, all acts and things required of them by the foregoing agreement.

L. Manuel Hendler,

Nathan Lebovitz.

May 25, 1929.

The Borden Company,
350 Madison Ave.,
New York, N. Y.

Dear Sirs:

We are delivering to you herewith a copy of your letter to us dated May 21st, 1929, and which has been formally accepted by our Company as of this date under authority granted by resolutions of the Board of Directors and Stockholders of the Company, certified copies of which have heretofore been furnished your counsel.

In connection with the contract we wish to call your attention specifically to the recital on Page 3 and in other places in your letter where it is stated that there is outstanding $675,000.00 principal amount of First Mortgage Bonds of our Company. This statement was the correct amount of outstanding bonds at the time when we were first having our negotiations. As shown by your letter, the bonds had the privilege of being converted into Prior Preference Stock of our Company. Between the beginning of our negotiations and May 15th, 1929, on which date our outstanding bonds were called, the bonds had been reduced by conversion to the amount of $501,000.00. These conversions increased the amount of our outstanding

Prior Preference Stock so that as of this date the amount of our outstanding Prior Preference Stock is the amount shown on Page 2 of your letter, to wit, 14,340 shares of the par value of $1,434,000.00.

Yours very truly,

HENDLER CREAMERY COMPANY, INC.

L. Manuel Hendler,

President.

LMH/ek".

That said contract was fully performed in accordance with its terms by both parties thereto, and Hendler Creamery Company, Incorporated, was duly liquidated and dissolved. Thereafter the Commissioner of Internal Revenue recognized that a reorganization had been brought about under Section 112 (b)4 of the Revenue Act of 1928, but asserted that the assumption by The Borden Company of the bonded indebtedness of Hendler Creamery Company, Incorporated, as set forth in the contract, constituted "other property" received and not distributed under the plan of reorganization, and hence was taxable under Section 112 (d)2 of the said Revenue Act.

Thereafter, because the said Hendler Creamery Company, Incorporated, had at that time been fully liquidated and dissolved, the Commissioner, purporting to act under Section 311 of the said Revenue Act of 1928, assessed a tax of Fifty-eight Thousand, Seven Hundred Seventy-two Dollars and Seventy-two Cents ($58,772.72) and interest against the Plaintiff herein as transferee of the said Hendler Creamery Company, Incorporated.

That, on April 15th, 1933, the plaintiff paid to said Galen L. Tait, then Collector of Internal Revenue for the United States of America for the District of Maryland, and now no longer in said office, the sum of Fifty-eight Thousand, Seven Hundred Seventy-two Dollars and Seventy-two Cents ($58,772.72), and also paid on said date the sum of Ten Thousand Seven Hundred Eighty-one Dollars and Ninety-seven Cents ($10,781.97), representing interest thereon, or a total of Sixty-nine Thousand, Five Hundred Fifty-four Dollars and Sixty-nine Cents ($69,554.69), said total sum representing an addi-

tional tax and interest thereon alleged to be due for the calendar year 1929, by Creameries, Inc., a dissolved corporation, and assessed against plaintiff as one of the alleged transferees of the assets of said corporation.

That plaintiff, on August 30, 1933, filed a claim for refund in the total amount of the aforesaid sum and interest thereon assessed and paid, setting forth in said claim for refund and brief filed in support thereof that said claim for refund should be allowed for the following reasons:

(1) The deficiency in tax and interest thereon for which this claim for refund is filed arises out of an alleged liability of the Taxpayer, L. Manuel Hendler, under Section 311 of the Revenue Act of 1928, as a transferee of the assets of Creameries, Incorporated, (formerly Hendler Creamery Company, Incorporated), 1100 E. Baltimore Street, Baltimore, Maryland, for an alleged deficiency in tax due from Creameries, Incorporated, for the year 1929, as disclosed in a letter from the Commissioner of Internal Revenue addressed to the Taxpayer, dated February 3, 1933.

(2) The above deficiency assessed against the Taxpayer herein and paid by him on April 15th, 1933, was based upon the determination and adjustments made therein, contained in a letter from the Commissioner and transmitted to Creameries, Incorporated, dated June 4th, 1932, which said determination and adjustments includes the sum of $534,297.50 as income for the year 1929 of Creameries, Incorporated. The alleged income of Creameries, Incorporated, for the year 1929 of $534,297.50 represents the cash equivalent of the bonded indebtedness of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) assumed by The Borden Company under the terms and provisions of a contract of reorganization between said Company and Hendler Creamery Company, Incorporated, and asserted to have been received by Creameries, Incorporated, as "other property" in pursuance of a plan of reorganization, resulting in an alleged taxable gain under Section 112 of the Revenue Act of 1928.

(3) The Taxpayer as transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) denies any liability under Section 311 of

the Revenue Act of 1928, arising out of the aforesaid alleged taxable gain recognized in accordance with Section 112 (d), (2) of the Revenue Act of 1928 and asserted to be due by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) because the inclusion in its income for the year 1929 of the cash equivalent of the bonded indebtedness of said corporation was erroneous.

(4) Under the terms and provisions of the aforesaid contract between The Borden Company and Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) which provided for a plan of reorganization, all that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) actually received or was entitled to receive for its assets and for the assumption of its bonded indebtedness by The Borden Company was stock of The Borden Company and cash for the redemption of its prior preference stock, which said cash was distributed in pursuance of the aforesaid plan of reorganization.

All that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) had to transfer was its net asset value and all it got for that net asset value was stock in The Borden Company and cash which was distributed to Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) stockholders in pursuance of the plan of reorganization.

(5) The transaction was an exchange of property, in pursuance of a plan of reorganization, by a corporation, a party to the reorganization, solely for stock in another corporation a party to the reorganization and for money distributed in pursuance of the plan of reorganization.

It is, therefore, respectfully submitted, that the transaction upon which the alleged deficiency is asserted, resulted in no taxable gain under Section 112 (b), (4) and (d), (1) of the Revenue Act of 1928, notwithstanding the assumption of the aforesaid bonded indebtedness and the assessment of the aforesaid tax plus interest thereon against the taxpayer, as transferree, was erroneous and the within claim for refund should be allowed in full.

(6) Otherwise stated the Commissioner is in error in considering the bonded indebtedness assumed by The Borden Company in a reorganization under Section 112

of the Revenue Act of 1928 as "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) and not distributed in pursuance of the plan of reorganization.

The taxpayer is not liable as an alleged transferee for deficiency assessed against Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) because the stockholders of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) were entitled to, and did, receive the stock of The Borden Company prior to the redemption date of the bonds.

Transferee liability is a remedy that is not available to a creditor whose remedy has arisen after the transfer has been made.

If the cash equivalent of the bonded indebtedness constituted "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) then at the time it was constructively received and the alleged tax accrued, the stockholders of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.) had already received the stock of The Borden Company and were, therefore, not subject to any transferee liability.

That a hearing was held on said claim for refund by the Commissioner of Internal Revenue and subsequently, to wit, under date of March 26th, 1934, plaintiff was advised in writing by the Commissioner of Internal Revenue that his aforesaid claim for refund would be disallowed and that official notice of the disallowance of said claim would be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932. Thereafter, under date of April 6, 1934, plaintiff received by registered mail the aforesaid formal notice of disallowance of his said claim for refund in accordance with the aforesaid provisions of said Section 1103 (a) of the Revenue Act of 1932.

No part of said sum of Sixty-nine Thousand Five Hundred Fifty-four Dollars and Sixty-nine Cents ($69,554.69) has been repaid to the plaintiff and the sum total thereof, with interest from April 15th, 1933, remains due and owing from the plaintiff to the defendant.

That this suit was not filed prior to the disallowance by the Commissioner of Internal Revenue of plaintiff's aforesaid claim for refund and further, that said suit was filed within two years from the date of disallowance of said claim for refund.

WHEREFORE, plaintiff demands judgment against the defendant in the amount of Sixty-nine Thousand Five Hundred Fifty-four Dollars and Sixty-nine Cents ($69,554.69), with interest thereon from April 15th, 1933.

JOS. ADDISON,

WM. R. SEMANS,

BARTON, WILMER, AMBLER & BARTON,

Attorneys for Plaintiff.

TO THE DEFENDANT—United States of America:

TAKE NOTICE—That on the day of your appearance to this action in the United States District Court for the District of Maryland, you will be required to plead to said declaration in accordance with the rules of said Court, or judgment by default will be entered against you.

JOS. ADDISON,

WM. R. SEMANS,

BARTON, WILMER, AMBLER & BARTON,

Attorneys for Plaintiff.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,
CITY OF BALTIMORE } ss:

L. MANUEL HENDLER, being duly sworn, deposes and says that he is the plaintiff named in a cause of action filed in the District Court of the United States, for the District of Maryland, on July 11, 1934, entitled "L. Manuel Hendler, as Transferee of Creameries, Inc., (formerly Hendler Creamery Company, Incorporated), Plaintiff vs. United States of America, Defendant—In the United States District Court for the District of Maryland, At Law, No. 5419"; that he has read the contents

of said cause of action and that the matters and things therein contained are true in substance and fact.

L. MANUEL HENDLER.

Sworn to and subscribed before
me this 4th day of December,
1936.

(Seal) HAROLD LEVIN,

Notary Public.

(My Commission expires May 3, 1937.)

PLEAS.

Filed 18th December, 1934.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Incorporated), Plaintiff,
vs.
United States of America, Defendant.
} Law No. 5419

The United States of America, defendant in the above entitled case, by Bernard J. Flynn, United States Attorney in and for the District of Maryland, for pleas to the declaration heretofore filed, and each and every count thereof, says:

1. That it never promised as alleged.

2. That it was never indebted as alleged.

BERNARD FLYNN,

United States Attorney.

DOCKET ENTRY.

December 18, 1934—Issues Joined.

VERDICT.

Filed 7th January, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.)
Plaintiff,
vs.
United States of America,
Defendant.
} At Law No. 5419

Verdict for the plaintiff in the sum of Sixty-two Thousand, One Hundred Forty-five Dollars and Eighty-nine cents ($62,145.89), together with interest thereon from April 15, 1933, according to law.

W. CALVIN CHESNUT,
United States District Judge.

January 7, 1937.

DOCKET ENTRY OF JUDGMENT.

January 11, 1937—Judgment on Verdict absolute in favor of the plaintiff in the sum of $62,145.89 together with interest thereon from April 15, 1933, according to law.

ORDER OF COURT EXTENDING TIME FOR FILING BILL OF EXCEPTIONS.

Filed 15th February, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.)
Plaintiff,
vs.
United States of America,
Defendant.
} At Law No. 5419

Upon the aforegoing petition, it is, this 15th day of February, 1937, by the United States District Court in and for the District of Maryland, ORDERED, that the time for filing a bill of exceptions in the aforementioned case be, and the same is hereby extended for forty days from the 20th day of February, 1937.

W. CALVIN CHESNUT,
United States District Judge.

ORDER OF COURT EXTENDING TIME FOR FILING BILL OF EXCEPTIONS.

Filed 25th March, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.)
Plaintiff,
vs.
United States of America,
Defendant.
} At Law No. 5419

Upon the aforegoing petition, it is, this 25th day of March, 1937, by the United States District Court in and

for the District of Maryland, ORDERED, that the time for filing a bill of exceptions in the aforementioned case be, and the same is hereby extended for thirty days from the 1st day of April, 1937.

W. CALVIN CHESNUT,
United States District Judge.

BILL OF EXCEPTIONS.

Filed 30th April, 1937.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.)
Plaintiff,
vs.
United States of America,
Defendant.
} At Law No. 5419

Be it remembered that at the trial of this cause in the December Term, 1936, of this Court, the Honorable W. Calvin Chesnut presiding, the following proceedings were had, to wit:

The plaintiff, to sustain the issues on his part, introduced a stipulation of facts, together with exhibits attached thereto and forming a part thereof, said exhibits being designated A, B, C-1, C-2, D-1, D-2, E, F, G, H, H-1, I, J, K, L, M, N, O, P, Q, R, S, T and U. Said stipulation, together with exhibits, was received by the Court and is set forth herein, insofar as relevant to this appeal, in haec verba as follows:

STIPULATION OF FACTS.

Filed 3rd December, 1936.

(Style of Court and Title Omitted)

It is stipulated and agreed by and between counsel for plaintiff and defendant that the following facts shall be accepted as true:

The Hendler Creamery Company, Incorporated, was, on and prior to May 21, 1929, a corporation of the State of Maryland. The corporate name of said corporation was subsequently changed to "Creameries, Incorporated" by amendment to its Charter, which said amendment was duly authorized by proper resolutions of the Board of Directors and Stockholders of the Company on May 21, 1929.

The Borden Company was, on and prior to May 21, 1929, a corporation of the State of New Jersey.

Prior to May 21, 1929, the Borden Company and Hendler Creamery Company, Incorporated, entered into negotiations in contemplation of effecting a conveyance of its entire assets and business to the Borden Company.

On May 21, 1929, an agreement, attached hereto and incorporated herein by reference, being marked "Exhibit A" for identification, was submitted to the stockholders and directors of Hendler Creamery Company, Incorporated.

Said agreement was duly approved and adopted at special meetings of the stockholders and directors of Hendler Creamery Company, Incorporated, held May 21, 1929. The minutes of said meetings are attached hereto and incorporated herein by reference, being marked "Exhibit B" for identification.

Under the terms of the agreement among other things Hendler Creamery Company, Incorporated, was required to provide for the calling for redemption of its outstanding First Mortgage six per cent Convertible Gold Bonds and Prior Preference Stock as of July 1, 1929, by resolutions to be adopted not later than May 21, 1929. The necessary resolutions were duly passed and are attached hereto and incorporated herein by reference, being marked "Exhibit C-1" and "Exhibit C-2".

The notices of redemption of said Bonds and Prior Preference Stock are in the form attached hereto and incorporated herein by reference, being marked "Exhibit D-1" and "Exhibit D-2".

The Borden Company, by resolution adopted May 15, 1929, authorized its officers to execute and perform its obligations under the agreement with the Hendler Creamery Company, Incorporated, which resolution is attached hereto and incorporated herein by reference, being marked "Exhibit E".

Hendler Creamery Company, Incorporated, voted on May 21, 1929, to change its name to "Creameries, Incorported" by amendment to its Charter. On June 25, 1929, the name of the Company was changed to Creameries, Incorporated.

On June 21, 1929, Hendler Creamery Company, Incorporated, complying with the agreement of May 21, 1929, conveyed or caused to be conveyed all of its assets and those of its subsidiaries to The Borden Company, receiving under said agreement 105,306 shares of the Common Stock of The Borden Company and $43,421.87 in cash, which stock and cash were distributed to the Stockholders of Hendler Creamery Company, Incorporated, in accordance with the plan set out in said agreement of May 21, 1929.

Pursuant to its agreement with Hendler Creamery Company, Incorporated, the Borden Company paid to the Commonwealth Bank, Baltimore, Maryland, the sum of $381,225.00 by its check dated June 27, 1929, to be used in retiring the First Mortgage Gold Bonds of said Hendler Creamery Company, Incorporated, and on the same date authorized said Commonwealth Bank to cancel $149,000.00 of face value of said bonds owned by it and its subsidiaries. The letter of June 27, 1929, is attached hereto and incorporated herein by reference being marked "Exhibit "F".

An examination of the 1929 income tax return of Creameries, Incorporated, was made and a report thereof made by the Internal Revenue Agent in Charge (Baltimore, Maryland) dated March 31, 1931, proposing an additional tax in excess of the amount shown by said return in the amount of $11,852.09. The pertinent parts

are attached hereto and incorporated herein by reference, being marked "Exhibit G".

A protest, dated June 8, 1931, against the findings in said report, was executed by Creameries, Incorporated, and filed.

Among the items disputed in said protest were—

1. Unamortized discount on Bonds retired for cash.....	$30,342.61
2. Premiums on Bonds retired for cash.....	26,569.40

Said protest is attached thereto and incorporated herein by reference, being marked "Exhibit H".

On November 23, 1931, a supplemental report for the year 1929 was made by the Internal Revenue Agent in Charge (Baltimore, Maryland), in which the foregoing unamortized discount and premiums on Bonds were recommended for allowance and the proposed additional tax was reduced to $5,591.76, which was duly assessed and paid. The said supplemental report is attached hereto and incorporated herein by reference, being marked "Exhibit H-1."

By a letter dated June 4, 1932, the Commissioner of Internal Revenue further revised the tax liability of Creameries, Incorporated, for the year 1929, asserting a deficiency in the amount of $58,772.72, as is more fully set forth in said letter, which is attached hereto and incorporated herein by reference, being marked "Exhibit I".

On August 17, 1932, Creameries, Incorporated, received a Notice and Demand for said additional tax. Said notice and demand are attached hereto and incorporated herein by reference, being marked "Exhibit J".

On August 22nd, 1932, the above bill was returned to the Collector of Internal Revenue with a letter which is attached hereto and incorporated herein by reference, being marked "Exhibit K".

Under date of August 29, 1932, L. Manuel Hendler and other stockholders of Creameries, Incorporated, received a letter asserting liability for said additional tax against

them as transferees of Creameries, Incorporated, which letter is attached hereto and incorporated herein by reference, being marked "Exhibit L".

By agreement between the Commissioner of Internal Revenue and L. Manuel Hendler, on January 9, 1933, the entire tax liability was asserted against L. Manuel Hendler as the principal stockholder.

On October 27, 1932, a protest was duly filed to said Commissioner's letter of August 29, 1932.

Under date of February 3, 1933, L. Manuel Hendler was advised that his protest was denied, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit M".

On April 15, 1933, L. Manuel Hendler paid to Galen L. Tait, then Collector of Internal Revenue for the United States for the District of Maryland, the aforesaid additional tax liability of..... $58,772.72
and interest thereon of..... 10,781.97

or a total of..... $69,554.69

On August 30, 1933, L. Manuel Hendler filed a claim for refund, which claim is attached hereto and incorporated herein by reference, being marked "Exhibit N".

Under date of December 2, 1933, L. Manuel Hendler was advised that his aforesaid claim for refund was disallowed tentatively, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit O".

Under date of March 26, 1934, L. Manuel Hendler was advised that his aforesaid claim for refund was disallowed, which advice is attached hereto and incorporated herein by reference, being marked "Exhibit P".

On April 6, 1934, the claim was rejected in a schedule approved by the Commissioner, as set forth in the Commissioner's letter dated April 6, 1934, copy of which is attached hereto and incorporated herein by reference, being marked "Exhibit Q".

On March 6, 1930, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), filed a ten-

tative income tax return for the calendar year 1929, with accompanying schedules. On June 6, 1930, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), filed a final income tax return for the calendar year 1929, together with accompanying schedules, certified copies of which are attached hereto and incorporated herein by reference, being marked "Exhibit R".

On June 17, 1929, a special meeting of the Board of Directors of the Hendler Creamery Company, Incorporated, was held relative to the distribution of The Borden Company stock to the Hendler Creamery Company, Incorporated, stockholders. The minutes of said meeting are attached hereto and incorporated herein by reference, being marked "Exhibit S".

On September 30, 1931, a Consent Waiver on Form No. 870, was executed by Creameries, Incorporated, by which it agreed to immediate assessment of a deficiency in tax against the corporation for the calendar year 1929. Copy of said Consent Waiver is attached hereto and incorporated herein by reference, being marked "Exhibit T".

On April 16, 1929, a preliminary agreement was entered into between The Borden Company and L. Manuel Hendler and Nathan Lebovitz, then owners of more than ninety per cent (90%) of the outstanding common and preferred stock of Hendler Creamery Company, Incorporated, and then controlling more than twenty per cent (20%) of the outstanding Prior Preference Stock of said Company. Said agreement is attached hereto and incorporated herein by reference, being marked "ExhibitU".

On July 10, 1929, the first mortgage of Hendler Creamery Company, Incorporated, was released.

On August 5, 1930, Creameries, Incorporated, was dissolved.

On June 21, 1929, there was outstanding three million, two hundred fifty-six thousand, nine hundred ninety-three (3,256,993) shares of the Capital Stock of The Borden Company, which number of shares outstanding included

one hundred five thousand, three hundred six (105,306) shares of The Borden Company stock distributed to stockholders of the Hendler Creamery Company, Incorporated.

On June 21, 1929, the market value of The Borden Company stock on the New York Stock Exchange was $89-15/16 per share. This value represented the mean between the high and low sales on that date.

The amount of the reduction in the income tax liability of Creameries, Incorporated, for the calendar year 1929, due to the Commissioner's allowance of unamortized discount on the First Mortgage 6% Convertible 20-Year Gold Bonds and to the allowance of the premium paid upon said bonds at retirement thereof was $6,260.33, the difference between the proposed deficiency of $11,852.09 as shown in Revenue Agent Bauer's report dated March 31, 1931, and the deficiency of $5,591.76 actually assessed as shown in Revenue Agent Bauer's second report dated September 25, 1931.

It is further agreed that either party to the cause may adduce additional evidence.

WILLIAM R. SEMANS,
JOSEPH ADDISON,
RANDOLPH BARTON, JR.,
BARTON, WILMER, BRAMBLE,
ADDISON & SEMANS,
Attorneys for Plaintiff.

BERNARD J. FLYNN,
United States Attorney.
Attorney for Defendant.

INDEX TO EXHIBITS.

Report of the Internal Revenue Agent in Charge (Baltimore, Maryland) dated March 31, 1931, covering examination of 1929 Income Tax Return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), proposing additional tax in the amount of $11,852.09, Exhibit G

Protest dated June 8, 1931, to the report of the Internal Revenue Agent in Charge dated March 31, 1931, filed by Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), Exhibit H

Supplemental report of the Internal Revenue Agent in Charge dated November 23, 1931, of the 1929 income tax return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), Exhibit H-1

Letter of the Commissioner of Internal Revenue dated June 4, 1932, revising the tax liability of Creameries, Incorporated, for the year 1929, asserting a deficiency in the amount of $58,772.72, Exhibit I

Notice and demand for additional tax of $58,772.72 against Creameries, Incorporated, received August 17, 1932, Exhibit J

Letter from counsel of former Stockholders and Officers of Creameries, Incorporated, to Collector of Internal Revenue re dissolution of Creameries, Incorporated, Exhibit K

Letter from Commissioner of Internal Revenue to L. Manuel Hendler, et al., Stockholders of Creameries, Incorporated, asserting liability for additional tax as transferees of Creameries, Incorporated, Exhibit L

Letter from Commissioner of Internal Revenue to L. Manuel Hendler dated February 3, 1935, advising that the protest filed by L. Manuel Hendler was denied, Exhibit M

Claim for refund filed by L. Manuel Hendler filed August 30, 1933, Exhibit N

Tentative notice of disallowance of claim for refund filed by L. Manuel Hendler, dated December 2, 1933, Exhibit O

Further notice of disallowance of claim for refund filed by L. Manuel Hendler, dated March 26, 1934, Exhibit P

Official notice of rejection of claim for refund filed by L. Manuel Hendler dated April 6, 1934, Exhibit Q

Certified copies of tentative and final income tax returns of Creameries, Incorporated (formerly Hendler Creamery, Incorporated), for calendar year 1929, filed March 6, 1930 and June 6, 1930, respectively, Exhibit R

Minutes of Special Meeting of Board of Directors of Hendler Creamery Company, Incorporated, held June 17, 1929, Exhibit S

Consent Waiver, Form No. 870, executed by Creameries, Incorporated, agreeing to immediate assessment of deficiency tax for calendar year 1929, Exhibit T

Agreement between The Borden Company and L. Manuel Hendler and Nathan Lebovitz, dated April 16, 1929, Exhibit U

EXHIBIT "B"

Minutes of Special Meetings of the Stockholders and Directors of Hendler Creamery Company, Incorporated, approving and adopting agreement between The Borden Company and Hendler Creamery Company, Incorporated.

HENDLER CREAMERY COMPANY, INCORPORATED.

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS.

Minutes of a Special Meeting of the Board of Directors of HENDLER CREAMERY COMPANY, INCORPORATED, a corporation of the State of Maryland, duly held at the principal office of said Company at Baltimore, Maryland, on May 21, 1929, at two o'clock in the afternoon, pursuant to waiver of notice.

The following named Directors were present:

Messrs.—Deupert,
L. M. Hendler,
B. R. Hendler,
Cover,
Brawner and
Lebovitz

constituting a majority of the Board and a quorum.

The President of the Company, L. Manuel Hendler, called the meeting to order and presided throughout. The Secretary of the Company, Nathan Lebovitz, acted as Secretary of the meeting.

The Secretary presented a waiver of notice and consent signed by all of the directors fixing the time and place of the meeting and the business to be transacted thereat. On motion, duly made and seconded, the said waiver and consent was ordered filed with the minutes of this meeting.

The President then stated that the meeting had been called for the purpose, amongst others, of considering the advisability of effecting a reorganization of the Com-

pany, and, pursuant to such plan of reorganization, conveying its entire assets and business to The Borden Company, a corporation of the State of New Jersey. The President presented to the Board a form of contract between The Borden Company and Hendler Creamery Company, Incorporated, which contract provides that a reorganization of Hendler Creamery Company, Incorporated shall be effected and that, pursuant to the plan of reorganization therein set forth, Hendler Creamery Company, Incorporated, shall convey, assign and transfer its entire property and assets, tangible and intangible of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), trademarks, patents, patent rights and good will, the said property and assets to include the entire issued and outstanding capital stock of each of its subsidiary companies, or should The Borden Company so request, in lieu of the stock thereof, the entire property, assets, trade name (including the exclusive right to do business under the corporate name of such subsidiary company), trademarks, patents, patent rights, business and good will of each or any of said subsidiary companies. In exchange therefor The Borden Company will:

(1) Issue and deliver to the Company, or upon its order, certificates for 86,716 shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share and the aggregate par value of $2,167,900 of the same character and tenor as the stock of The Borden Company now listed on the New York Stock Exchange and constituting part of the authorized capital stock of The Borden Company.

(2) Assume and agree to pay all indebtedness and liabilities whatsoever of this Company and of each subsidiary thereof that may convey its assets and business to The Borden Company except (a) liability for capital stock, (b) certain tax liabilities as set forth in said contract and (c) legal fees of counsel for this Company and its subsidiaries in connection with the said contract with The Borden Company and the transfer thereby required and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of this Company.

(3) Provide for the liquidation of the shares of Prior Preference Stock of Hendler Creamery Company, Incorporated, now outstanding at the option of the holders thereof, either (a) by payment of the sum of $107.50 per share plus an amout equal to the accrued and unpaid dividends thereon at the rate of $7 per share per annum accumulated to the date of closing of title to The Borden Company or, if the certificates therefor are surrendered after the closing of title, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (b) by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share in exchange for every three shares of the Prior Preference Stock of this Company.

The President stated that by the terms of said agreement it was understood and agreed that all outstanding First Mortgage 6% Convertible Gold Bonds and all Prior Preference Stock of this Company, shall be called for redemption on July 1, 1929, and that proper resolutions calling said bonds for redemption shall be adopted not later than May 21, 1929.

It was ordered that a copy of said agreement be identified by the Secretary and filed with and as a part of the minutes of this meeting.

General discussion then ensued.

On motion, duly made and seconded, and by the unanimous vote of all the directors present, constituting a majority of the Board of Directors and a quorum, the following resolutions and preambles were unanimously adopted:

WHEREAS, the President has submitted to the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, a form of contract proposed to be entered into between The Borden Company and this Company whereby it is provided that this Company shall, pursuant to a plan of reorganization in said contract set forth, convey, assign and transfer its entire property and assets, tangible and intangible of every kind and

description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the name "Hendler Creamery Company, Incorporated"), trademarks, patents, patent rights and good will. The said property and assets are to include the entire issued and outstanding capital stock of each of its subsidiary companies, but should The Borden Company so request, it shall in lieu of conveying to The Borden Company the said stock, cause each of the said subsidiary companies, or such one or more of them as The Borden Company may request, to transfer and convey to The Borden Company its entire property and assets, tangible and intangible, of every kind and description and wheresoever situated, as well as its business as a going concern, its trade name (including the exclusive right to do business under the corporate name of such subsidiary company), trademarks, patents and patent rights and good will. In exchange therefor The Borden Company will (1) issue and deliver to this Company, or upon its order, certificates for 86,716 shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share and the aggregate par value of $2,167,900 of the same character and tenor as the stock of The Borden Company now listed on the New York Stock Exchange and constituting part of the authorized capital stock of The Borden Company; and (2) assume and agree to pay all indebtedness and liabilities whatsoever of this Company, and of each subsidiary thereof that may convey its assets and business to The Borden Company, as the same shall exist at the closing of title to The Borden Company except (a) liability for capital stock, (b) any income or excess profits taxes incurred by this Company or by either or any of its said subsidiary companies by reason of the conveyance of its assets and business to The Borden Company and (c) any tax incurred by this Company or by any subsidiary company whose property and business The Borden Company may elect to take in respect of business transacted by this Company or by any such subsidiary company subsequent to the closing of title to The Borden Company and (d) any ad-

ditional income and/or excess profits taxes now or heretofore imposed upon this Company or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1929 and (e) legal fees of counsel for this Company and its subsidiaries in connection with the said contract with The Borden Company and the transfer thereby required and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of this Company; and (3) provide for the liquidation of the 14,340 shares of Prior Preference Stock of this Company now outstanding, at the option of the holders thereof, either (a) by payment of the sum of $107.50 per share plus an amount equal to the accrued and unpaid dividends thereon at the rate of $7 per share per annum accumulated to the date of closing of title to The Borden Company or, if the certificates therefor are surrendered after the closing of title, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, the date on which such Prior Preference Stock is to be redeemed as hereinafter provided, or (b) by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share in exchange for every three shares of the Prior Preference Stock of this Company; and

WHEREAS, the members of this Board of Directors have inquired into and are familiar with the standing, property and business of The Borden Company. On April 24, 1929, the par value of the shares of The Borden Company were reduced from $50 per share to $25 per share, each stockholder receiving two shares of the new $25 par stock for each share of the old $50 par stock. During the first four months of the year 1929 The Borden Company shares of stock of the par value of Fifty Dollars ($50) each have sold in the open market at prices ranging from Two Hundred Three Dollars and Seventy-five cents ($203.75) per share to One Hundred Seventy-four Dollars and Fifty cents ($174.50) per share. In the judgment of this Board, at a conservative valuation,

the shares of stock of The Borden Company that will be received by this Company are adequate consideration for the assets and businesses to be conveyed to The Borden Company in return therefor. Now, therefore, be it

RESOLVED, (1) That the Board of Directors of Hendler Creamery Company, Incorporated, do hereby declare that, in their opinion, the contract proposed to be entered into, between The Borden Company and this Company, whereby it is provided that this Company, pursuant to a plan of reorganization, convey to the Borden Company all of its property, assets, business, trade name and good will including the entire capital stock of its subsidiary companies, or, in lieu of the stock of any subsidiary, the business and assets thereof, upon the terms and conditions in said agreement set forth, is fair and reasonable, and that this Board of Directors deem it expedient and to the best interests of this Company and its stockholders to enter into a contract substantially in the form presented to this meeting.

(2) That subject to the approval of the Common and Preferred stockholders of the Company (the Prior Preference Stock being called for redemption as hereinafter provided), the Board of Directors of Hendler Creamery Company, Incorporated do hereby approve that this Company enter into a contract substantially in the form presented to this meeting, and the President of this Company be, and he hereby is, authorized and instructed to execute for and in behalf of this Company a contract substantially in the form presented to this meeting with such changes in the provisions of said contract as the President may deem to be proper and for the best interests of this Company, and he hereby is authorized and instructed, in the name and on behalf of this Company, to deliver such contract to The Borden Company.

(3) That a special meeting of the Common and Preferred stockholders of this Company be, and it hereby is, called to consider and take action upon the conveyance of the said property, assets, business,

trade name and good will of this Company, to The Borden Company. That such meeting of the stockholders be held at the principal office of the Company in Baltimore, Maryland, on May 21st, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to the holders of the Common and Preferred stock of this Company.

(4) That upon the holders of the Common and Preferred Stock of the Company at such special meeting consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, this Board hereby declares it advisable to change the corporate name from Hendler Creamery Company, Incorporated to

CREAMERIES, INC.

and to amend the charter of the Company by striking out Article Second of the Charter of the Company, and inserting in lieu thereof the following: "Second: The name of the Corporation (which is hereinafter called "corporation") is:

CREAMERIES, INC.

That a special meeting of the Common and Preferred stockholders of the Company be, and it hereby is, called to consider and take action upon the adoption of the amendment advised as aforesaid, and that such meeting be held at the principal office of the Company at Baltimore, Maryland, on May 21, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to the holders of the Common and Preferred stock of this Company issued and outstanding. That upon the consent of the holders of the Common and Preferred stock of the Company given at such meeting, the President and Secretary shall make, acknowledge and file all such certificates of change in the corporate name as shall be required to make such change effective, in accordance with the laws of the State of Maryland.

(5) That upon the holders of the Common and Preferred stock, at the meeting held for the purpose, consenting to the conveyance of this Company's property, assets, business, trade name and good will to The Borden Company, the President or Vice-President and the Secretary or Assistant Secretary, as well as all other executive officers of this Company be, and they hereby are, authorized and instructed in the name and on behalf of this Company to execute, acknowledge and deliver to The Borden Company, or to its nominee, all such deeds, bills of sale, assignments and other conveyances and papers and documents as it shall be necessary for this Company to execute and deliver in order to transfer its property, assets, business, trade name and good will to The Borden Company and to vest title thereto in The Borden Company; and that the Executive officers of this Company be, and they hereby are, authorized and instructed to take any and all further steps and proceedings and to do all such further things as, in their judgment, shall be requisite and necessary to carry out the said conveyance of the property, assets, business, trade name and good will of this Company to The Borden Company.

(6) That upon the holders of the Common and Preferred stock, at the meeting held for the purpose, consenting to the conveyance of this Company's property, assets, business, trade name and good will to The Borden Company, this Board of Directors hereby declares it advisable and most for the benefit of Hendler Creamery Company, Incorporated, that said Company be dissolved thereafter as soon as may be practicable. That a special meeting of the holders of the Common and Preferred stock of this Company be called to consider and take action upon the dissolution of this Company and that such meeting be held at the principal office of the Company at Baltimore, Maryland, on May 21, 1929, at 2:30 o'clock in the afternoon, and that the Secretary be, and he hereby is, instructed to give due notice of such meeting to all the holders of the Common and Preferred stock of this Company issued and outstanding. That upon the consent of such stockholders given at such meeting, the President and the

Secretary shall make, acknowledge and file all such petitions for the dissolution of this Company, and the officers of this Company shall take all such steps, as shall be required to make such dissolution effective, in accordance with the laws of the State of Maryland.

(7) That upon the holders of the Common and Preferred stock at the meeting held for the purpose consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, and in the event that The Borden Company should desire the conveyance to it of the business and assets of Supreme Ice Cream Company, Horn Ice Cream Company and Clover Ice Cream Company, or either or any of the said corporations, in lieu of the capital stock thereof, the President of this Company be and he hereby is authorized and instructed to vote the capital stock of such corporations held by this Company in favor of the conveyance of their respective businesses and assets to The Borden Company, a change of their respective corporate names and dissolution, and/or execute for and on behalf of this Company a consent or consents thereto, and to do any and all further acts and things for and on behalf of this Company as a stockholder of such corporations as may be necessary to comply with the provisions of the contract to be entered into between this Company and The Borden Company that relate to such corporations.

After discussion and on motion duly made and unanimously carried it was

RESOLVED, that upon the Common and Preferred stockholders at the special meeting held for that purpose, consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, provision be made for the liquidation of all of the Prior Preference Stock of this Company in accordance with the plan of reorganization set forth in the said proposed contract with The Borden Company, either (1) by payment to the holders thereof of the redemption price, to wit, $107.50 per share and ac-

crued dividends thereon accumulated to the closing of title to The Borden Company, or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, or (2) at the option of the holders of such Prior Preference Stock by the delivery of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share for each three shares of the Prior Preference Stock of this Company.

The President then submitted to the meeting a form of offer to the holders of the Prior Preference Stock of the Company to be mailed in accordance with the foregoing resolution and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the form of offer presented to this meeting be and it hereby is approved and adopted, and the proper officers of this Company be and they hereby are authorized and instructed to mail a copy of such notice to each holder of Prior Preference Stock of record at the close of business on May 21st, 1929.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed agent and depositary of this Company, to receive the deposited certificates of the Prior Preference Stock of this Company the holders of which may elect to surrender the same for stock of The Borden Company, as hereinbefore provided, all such certificates to be deposited not later than June 14th, 1929, and upon the closing with The Borden Company, to receive from The Borden Company the certificate for its stock required for the liquidation of the Prior Preference Stock so surrendered, together with the necessary cash for the adjustment of odd shares, as set forth in said offer, and to deliver such certificates and to pay such cash to the depositors of Prior Preference Stock who shall have elected to take Borden stock in liquidation thereof, in the proportions and amounts set forth in said offer. Thereupon all certificates for Prior Preference Stock so surrendered shall forthwith be cancelled and such

stock shall no longer be deemed outstanding for any purpose whatsoever. All certificates so surrendered shall be duly endorsed and, if the Borden stock is to be issued in the name of any other than the registered holder of the Prior Preference Stock to be exchanged therefor, then the surrendered Prior Preference Stock certificates shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of the said Commonwealth Bank of Baltimore, and accompanied by any papers that may be required to place them in transferable form together with funds at the rate of two cents per share to cover transfer taxes.

The President then submitted to the meeting a form of notice of redemption of the Prior Preference Stock of the Company and after discussion and on motion, duly made, seconded and unanimously carried, it was

RESOLVED, that this Board of Directors does hereby exercise its right to redeem all the outstanding Prior Preference Stock of this Company, and all of said stock is hereby called for redemption on July 1, 1929, at the office of Commonwealth Bank of Baltimore by paying therefor in cash $107.50 per share and all accrued and unpaid dividends thereon to said date; and this Board does hereby authorize and direct that there be forthwith mailed to each holder of record of any shares of said Prior Preference Stock at the close of business on May 21st, 1929, at his, her or its address as shown by the books of this Company, a notice in which shall be stated the intention of this Company to redeem said Prior Preference Stock in whole, and the time and place for such redemption, all as provided by the certificate of incorporation of this Company, such notice to be substantially in the form previously presented to this meeting and hereby approved; and this Board does hereby direct and declare that no dividends shall accrue on said Prior Preference Stock from and after July 1, 1929, and that on and after that date the certificates for such Prior Preference Stock as may then be outstanding shall entitle the holders thereof to no rights whatsoever except to receive the

cash redemption price of $107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed the agent of this Company for the purpose of the redemption of the said Prior Preference Stock and that the proper officers of this Company be and they hereby are authorized and directed to deliver to said Commonwealth Bank of Baltimore a certified list of the stockholders of record of the said Prior Preference Stock at the close of business on May 21st, 1929, and to keep said Commonwealth Bank of Baltimore advised as to any transfers of Prior Preference Stock which are made on the books between May , 1929, and the 1st day of July, 1929. and to furnish said Commonwealth Bank of Baltimore with a certified list of the holders of record of said Prior Preference Stock at the close of business on June 29, 1929.

RESOLVED FURTHER, that the transfer books for said Prior Preference Stock be permanently closed at the close of business on June 29, 1929.

RESOLVED FURTHER, that said Commonwealth Bank of Baltimore be and it hereby is directed upon receipt from this Company or from The Borden Company of sufficient monies to redeem the outstanding Prior Preference Stock of this Company (to wit, all Prior Preference Stock, the holders of which shall not have elected to receive stock of The Borden Company in liquidation thereof as hereinbefore provided) to pay out said monies on and after July 1, 1929, at the rate of $107.50 for each share of Prior Preference Stock surrendered for redemption plus accrued dividends thereon to July 1, 1929. All such payments shall be made against surrender of the certificates for said Prior Preference Stock for cancellation. Said payments shall be made by check or draft to the order of the stockholder of record as shown by the certificate surrendered for redemption or, if payment is to be made to

anyone other than the stockholder of record, then the surrendered stock certificate shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of said Commonwealth Bank of Baltimore and accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes. Provided that if any holder of Prior Preference Stock shall surrender the certificates therefor for redemption prior to July 1, 1929, the said Commonwealth Bank of Baltimore is hereby authorized and directed upon receipt of the necessary monies as aforesaid, to pay forthwith to such stockholder the redemption price of his stock plus accrued dividends thereon to the date when the said monies shall be received by the redemption agent or, if such certificates are surrendered after said date, then to the date of surrender; provided, however, that no accrued dividends shall be paid for any period subsequent to July 1, 1929. Any monies received from The Borden Company for the purpose of redeeming the Prior Preference Stock of this Company and not required for that purpose shall be returned to The Borden Company.

RESOLVED FURTHER, that the officers of this Company be and they hereby are authorized and directed to take any and all such steps (including the entering into of any contract which to them may seem desirable with Commonwealth Bank of Baltimore in connection with the redemption of the said Prior Preference Stock and to do any and all such acts and things as may be necessary or advisable to carry out the purposes of the foregoing resolutions.

RESOLVED FURTHER, that the proper officers of this Company be and they hereby are directed to certify a copy of these resolutions under the seal of this Company, and to lodge the same with the said Commonwealth Bank of Baltimore together with certified specimens of certificates for the said Prior Preference Stock of this Company and a certified copy of the certificate of incorporation.

On motion duly made, seconded and unanimously carried it was

RESOLVED, that prior to the formal dissolution of the Company the Directors shall cause the Company to be liquidated and that the general plan of liquidation shall be as follows:

After the Directors have paid or secured to be paid any and all liabilities of the Company, the assets of the Company then remaining shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common stock. In all other respects the details of the liquidation shall be determined by the Directors.

AND BE IT FURTHER RESOLVED that this resolution be laid before the meeting of the Stockholders of the Company which has been authorized to be called by other resolutions adopted at this meeting for May 21st, 1929.

And on motion duly made, seconded and unanimously carried, it was

RESOLVED that at the meeting of the Stockholders of Hendler Creamery Company, Incorporated, to be held on May 21st, 1929, John D. Brawner and H. B. Siegmund be and they hereby are appointed tellers to canvass and count the vote and/or votes cast at said meeting.

There being no further business, on motion, the meeting adjourned.

NATHAN LEBOVITZ,

Secretary.

HENDLER CREAMERY COMPANY, INCORPORATED.

MINUTES OF A SPECIAL MEETING OF STOCKHOLDERS.

Minutes of a special meeting of the Common and Preferred Stockholders of HENDLER CREAMERY COMPANY, INCORPORATED, a corporation of the State of Maryland, held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.30 o'clock in the afternoon.

The President of the Company, Mr. L. Manuel Hendler called the meeting to order and presided throughout. The Secretary of the Company, Mr. Nathan Lebovitz acted as Secretary of the meeting and recorded the minutes.

The Secretary stated that the meeting had been duly warned in the manner provided by Section 19 of the General Law of the State of Maryland and presented the notice of the meeting, together with due proof by affidavit, that a copy of said notice had been served upon every holder of the Common and Preferred Stock of the Company issued and outstanding, in the manner and within the time provided by the By-Laws and the laws of the State of Maryland. On motion, duly made and seconded, the said notice and affidavit were ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary presented a list of the Common and Preferred Stockholders and ascertained and reported that there were present at the meeting, in person or by proxy, the holders of 30,000 shares of the Common Stock of the Company out of 30,000 shares issued and outstanding, and the holders of 20,000 shares of the Preferred Stock of the Company out of 20,000 shares of the Preferred Stock issued and outstanding. The Secretary presented to the meeting a list of the holders of the Common and Preferred Stock so present in person or by proxy, together with the number of shares held by each, and in the case of stock represented by proxy, the names of the proxies. The said lists were duly ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary further reported that the holders of more than two-thirds of the entire issued and outstanding Common Stock and of more than two-thirds of the entire issued and outstanding Preferred Stock were present at the meeting and that a quorum was in attendance.

On motion, duly made and seconded, the proxies presented were ordered on file as a part of and appendix to the minutes of the meeting.

The Secretary submitted and read to the meeting the minutes of the proceedings of the Board of Directors of this Company at a special meeting thereof held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.00 o'clock in the afternoon, and also submitted and read to the meeting the minutes of the proceedings of the Board of Directors of this Company at a special meeting thereof held at the principal office of the Company at Baltimore, Maryland, on May 21st, 1929, at 2.00 o'clock in the afternoon, and also submitted and read to the meeting the agreement with The Borden Company approved by the directors at their said meeting.

The following resolutions were made and a vote taken by ballot:

RESOLVED that the Common and Preferred Stockholders of Hendler Creamery Company, Incorated, a corporation of the State of Maryland, present at this meeting, constituting the holders of more than two-thirds of the issued and outstanding Common Stock and more than two-thirds of the issued and outstanding Preferred Stock of this Company, do hereby

(1) Authorize that said Hendler Creamery Company, Incorporated convey, pursuant to a plan of reorganization approved by the directors at a special meeting held May 21, 1929, its entire property, assets, business, trade name, patent and trademark rights and good will, including the entire capital stock of each of its subsidiaries, or, if The Borden Company should so request in lieu thereof the entire property, assets, business, trade name, patent and trademark

rights and good will of all or any thereof, to The Borden Company, a corporation of the State of New Jersey, in exchange for which The Borden Company will (a) issue and deliver to this Company, or upon its order, certificates for eighty-six thousand seven hundred and sixteen (86,716) shares of the par value of Twenty-five Dollars ($25) each of the full paid and non-assessable capital stock of The Borden Company and (b) assume and agree to pay all liabilities of the Company and of each subsidiary thereof which may convey its assets and business to The Borden Company as the same exist at the date of the closing of title to The Borden Company, excepting such liabilities as are expected in said plan of reorganization, and (c) provide for the liquidation of this Company's Prior Preference Stock at the option of the holders thereof either by payment of the sum of $107.50 per share plus an amount equal to the accrued and unpaid dividends thereon, as provided in said plan of reorganization, or by the issuance of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share in exchange for every three shares of the Prior Preference Stock of this Company, all as more specifically set forth in said plan of reorganization.

(2) Approve the agreement with The Borden Company which has been submitted and read to this meeting containing the terms and conditions of the proposed conveyance and plan of reorganization.

(3) Ratify, approve and confirm all and every the proceedings of the Board of Directors of this Company at a special meeting thereof held May 21st, 1929, as shown by the minutes of the said meeting now presented to the stockholders present at this meeting, as well as all action taken and all things done by the officers of this Company, pursuant to the resolutions of the directors, adopted at the said meeting thereof; and each and all of the said proceedings of the

directors and of the officers are hereby adopted, approved and confirmed.

(4) Authorized and empower the officers and directors of this Company to execute, acknowledge and file all such papers and certificates and to do all such things as shall be requisite and necessary to carry out said conveyance of all the property, assets, business, trade name, trademark and patent rights and good will to The Borden Company.

FURTHER RESOLVED, that the charter of Hendler Creamery Company, Incorporated, be and the same hereby is amended so as to change the name of the Company from "Hendler Creamery Company, Incorporated" to "Creameries, Inc."; and that Article Second of said charter be amended so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereafter called "Corporation") is: Creameries, Inc.

That the proper officers of this Company be, and they hereby are, authorized and instructed to make, verify and file all such certificates of the change in the corporate name and/or articles of amendment as may be required by the laws of the State of Maryland.

FURTHER RESOLVED, That it is advisable to and this Company does elect to wind up and dissolve. That the proper officers of this Company be, and they hereby are, authorized and instructed to make, verify and file such petition for dissolution, and such other statements and/or papers as may be required by the laws of the State of Maryland, and that the directors and officers of the Company are directed to take all such steps as may be necessary to wind up the affairs of this Company, and to distribute its assets to the stockholders.

RESOLVED, That prior to the formal dissolution of the Company the Directors shall cause the Com-

pany to be liquidated and that the general plan of liquidation shall be as follows:

After the Directors have paid or secured to be paid any and all liabilities of the Company, the assets of the Company then remaining shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common Stock. In all other respects the details of the liquidation shall be determined by the Directors.

The taking of the vote having been completed and the ballots counted, the Tellers reported that out of a total of 30,000 shares of the Common Stock present at the meeting 30,000 shares, constituting more than two-thirds of the total number of shares of the Common Stock of the Company issued and outstanding, were voted for the adoption of the said resolutions and that out of a total of 20,000 shares of the Preferred Stock present at the meeting, 20,000 shares, constituting more than two-thirds of the total number of shares of the Preferred Stock of the Company issued and outstanding, were voted for the adoption of the said resolutions, and that no shares of the capital stock were voted against their adoption, and that the resolutions had been adopted by the affirmative vote of shareholders holding at least two-thirds of the Common Stock and at least two-thirds of the Preferred Stock of the Company.

The resolutions were thereupon declared by the Chairman to have been duly adopted by the vote of the holders of more than two-thirds of the Common Stock and more than two-thirds of the Preferred Stock of the Company.

On motion, duly made and seconded, the meeting then adjourned.

NATHAN LEBOVITZ,

Secretary.

WAIVER OF NOTICE

MEETING OF STOCKHOLDERS OF

HENDLER CREAMERY COMPANY, INCORPORATED.

The undersigned, being the holders of the number of shares of Preferred Stock and Common Stock of Hendler Creamery Company, Incorporated, set after their respective names, and together constituting all of the stockholders of said Company, do hereby waive notice of a special meeting of stockholders to be held at 1100 E. Baltimore Street, Baltimore, Maryland, on the 21st day of May, 1929, at 2.30 o'clock in the afternoon, for the purpose of considering and approving the action taken by the Board of Directors of the Company at a meeting held on the 21st day of May, 1929, and particularly the following propositions:

1. To authorize that said Hendler Creamery Company, Incorporated, pursuant to a plan of reorganization approved by the directors, convey all of its property, assets, business, trade name and good will, including the entire capital stock of each of its subsidiaries, or, should The Borden Company so request, in lieu thereof the entire property, assets, business, trade name and good will of all or any of said subsidiaries, to The Borden Company, a corporation of the State of New Jersey, for the consideration and upon the terms and conditions as shown by the minutes of a meeting of the Board of Directors, held May 21st, 1929.

2. To approve the agreement with The Borden Company, which will be submitted to the meeting, containing the terms and conditions of the proposed conveyance and plan of reorganization.

3. If such conveyance to The Borden Company be approved, to amend Article Second of the Charter of the Company so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereinafter called 'Corporation') is:

CREAMERIES, INC."

4. To ratify, confirm and approve the proceedings of the Board of Directors of the Company at their meeting held on May 21, 1929, as shown by the minutes of said meeting presented to the stockholders; to ratify, confirm and approve all action taken by the officers of the Company pursuant to the resolutions adopted by the directors at their said meeting.

5. If such conveyance to The Borden Company be approved, to vote in favor of a resolution that the Company be dissolved.

6. To take any and all such further action in connection with the above matters, or any of them, as the stockholders present at such meeting shall approve.

AS WITNESS our hands and seals this 21st day of May, 1929.

Name	Preferred Stock	Common Stock

(Signed)

L. Manuel Hendler
Nathan Lebovitz
Irvin D. Baxter
Adam Deupert
C. C. Croggon
Rose Hendler
Louis Hendler
Michael Hendler
B. R. Hendler
Harry C. Cover
J. D. Brawner
Harry Hendler
Harry A. Duke
J. A. Robison
Harry B. Siegmund
Harry K. Bosch
Daniel F. Banks, Jr.
John W. Rogers

	Common Stock	Preferred Stock
L. Manuel Hendler	24,650	16,667
Nathan Lebovitz	1,250	833
Irvin D. Baxter	100	....
Adam Deupert	200	....
C. C. Croggon	50	....
Rose Hendler	1,500	1,000
Louis Hendler	250	167
Michael Hendler	500	333
B. R. Hendler	1,025	683
Harry Hendler	250	167
Harry C. Cover	50	33
John D. Brawner	37	25
Harry A. Duke	50	33
J. A. Robison	25	17
Harry K. Bosch	25	17
Harry B. Siegmund	12	8
Daniel F. Banks, Jr.	13	9
John W. Rogers	13	8
Total	30,000	20,000

I, NATHAN LEBOVITZ, Secretary of Hendler Creamery, Inc., certify that the foregoing is a list of Common and Preferred Stockholders of record May 21, 1929.

As Witness my hand and the corporate seal of the Company this 25th day of May, 1929.

NATHAN LEBOVITZ,

Secretary.

HENDLER CREAMERY COMPANY,
INCORPORATED

STOCKHOLDERS' PROXY

Number of shares

Common
Preferred

KNOW ALL MEN BY THESE PRESENTS, that the undersigned stockholder of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland,

does hereby nominate, constitute and appoint L. Manuel Hendler and Nathan Lebovitz, and each of them, the true and lawful attorney, or attorneys, for and in the name, place and stead of the undersigned, to vote and act upon and consent in respect to any and all shares of the capital stock of said Company held or owned by or standing in the name of the undersigned, at a special meeting of the Common and Preferred Stockholders of said Company, to be held at the principal office of the said Company, No. 1100 E. Baltimore Street, in the City of Baltimore, State of Maryland, on , 1929, at o'clock in the noon, and at any and all adjournments thereof, as fully as the undersigned could do if personally present, with full power of substitution and revocation in the premises.

Without any limitation of the authority hereinabove given, the said attorney, or attorneys, and his or their substitutes, are hereby expressly authorized to vote in favor of the following propositions:

1. To authorize that said Hendler Creamery Company, Incorporated, pursuant to a plan of reorganization approved by the directors, convey all of its property, assets, business, trade name and good will, including the entire capital stock of each of its subsidiaries, or should The Borden Company so request, in lieu thereof the entire property, assets, business, trade name and good will of all or any of said subsidiaries, to The Borden Company, a corporation of the State of New Jersey, for the considerations and upon the terms and conditions as shown by the minutes of a meeting of the Board of Directors, held , 1929.

2. To approve the agreement with The Borden Company, which will be submitted to the meeting, containing the terms and conditions of the proposed conveyance and plan of reorganization.

3. If such conveyance to The Borden Company be approved, to amend Article Second of the Charter of the Company so that as amended it shall read as follows:

"Second: The name of the corporation (which is hereinafter called "Corporation") is:

4. To ratify, confirm and approve the proceedings of the Board of Directors of the Company at their meeting held on , 1929, as shown by the minutes of said meeting presented to the stockholders; to ratify, confirm and approve all action taken by the officers of the Company pursuant to the resolutions adopted by the directors at their said meeting.

5. If such conveyance to The Borden Company be approved, to vote in favor of a resolution that the Company is dissolved, and for a general plan of liquidation whereby the net assets of the Company shall be distributed among the Preferred and Common Stockholders of the Company at an equal rate per share of their holdings, whether of Preferred or Common Stock.

6. To take any and all such further action in connection with the above matters, or any of them, as the Stockholders present at such meeting shall approve.

IN WITNESS WHEREOF, the undersigned has duly executed these presents.

Dated, , 1929.

.....

Witness:

.....

NOTE: This form of proxy should be dated, signed, witnessed and mailed in the enclosed envelope by each stockholder who does not expect personally to attend the meeting. Corporations having seals should affix them. Please fill in the blank left for the date of execution.

HENDLER CREAMERY COMPANY, INCORPORATED.

WAIVER OF NOTICE OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS.

We, the undersigned, being the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, do hereby waive notice of the time and place of a special meeting of the said Board of Directors and of the business to be transacted at said meeting.

We hereby designate the 21st day of May, 1929, at two o'clock in the afternoon, as the time and the principal office of the Company at Baltimore, Maryland, as the place of such meeting of the said Board of Directors; the purpose of said meeting being to consider and take action upon the following propositions:

(1) To consider the advisability of conveying pursuant to a plan of reorganization, all of the property, assets, business, trade name and good will of Hendler Creamery Company, Incorporated, including the entire capital stock of each of its subsidiary companies, or should The Borden Company desire, in lieu of the stock thereof, the entire property, assets, business, trade name and good will of each or any of such subsidiaries to The Borden Company, a corporation of the State of New Jersey, and if such conveyance be approved, to authorize the Company to enter into an agreement with said The Borden Company for such conveyance to it upon such terms and conditions as the Board of Directors shall deem expedient and for the best interests of the Company.

(2) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution to call and redeem all the Prior Preference Stock of this Company on July 1, 1929, at 107½ and accrued dividends.

(3) If such proposed conveyance to The Borden Company be approved by the directors, to call a special meeting of the Common and Preferred

Stockholders of Hendler Creamery Company, Incorporated, for the purpose of considering such proposed conveyance and of taking action thereon and for the purpose of submitting to such stockholders for their approval the said agreement with The Borden Company.

(4) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution declaring that it is advisable that the corporate name of the Company be changed from Hendler Creamery Company, Incorporated, to Creameries, Inc., and that a special meeting of the Common and Preferred Stockholders be called to consider and take action upon the said change in the corporate name.

(5) If such proposed conveyance to The Borden Company be approved by the directors, to adopt a resolution declaring that dissolution is advisable, and that a special meeting of the Common and Preferred Stockholders be called to consider and take action upon the dissolution of the Company.

(6) To take any and all such further action in connection with the above matters, or any of them, as the directors present at the said meeting shall approve.

And we do hereby waive all requirements of the laws of the State of Maryland and of the By-Laws of this Company as to notice of the time and place and object of said meeting.

Dated, Baltimore, Maryland; May 21, 1929.

L. MANUEL HENDLER,
NATHAN LEBOVITZ,
IRVIN D. BAXTER,
ADAM DEUPERT,
J. D. BRAWNER,
A. R. HENDLER,
HARRY C. COVER.

EXHIBIT "C-1"

Resolutions of the Hendler Creamery Company calling for redemption First Mortgage 6% Convertible Gold Bonds.

HENDLER CREAMERY COMPANY, INCORPORATED

MINUTES OF SPECIAL MEETING OF BOARD OF DIRECTORS.

May 15, 1929.

A special meeting of the Board of Directors of Hendler Creamery Company, Incorporated, a corporation of the State of Maryland, was duly held at the principal office of said Company at Baltimore, Maryland, on May 15, 1929, at 9:30 o'clock in the forenoon, pursuant to waiver of notice.

The following named Directors were present: Messrs. Deupert, L. M. Hendler, B. R. Hendler, Cover, Brawner and Lebovitz, constituting a majority of the Board and a quorum.

The President of the Company, L. Manuel Hendler, called the meeting to order and presided throughout.

The Secretary of the Company, Nathan Lebovitz, acted as Secretary of the meeting.

The Secretary presented the waiver of notice and consent signed by all of the Directors fixing the time and place of the meeting and the business to be transacted thereat.

On motion duly made and seconded, the said waiver and consent was ordered filed with the minutes of this meeting.

The President then stated a plan of effecting a reorganization of the Company by conveying its entire assets and business to The Borden Company, a corporation of the State of New Jersey, was being negotiated and probably would be closed within the next few days, subject to further consideration and approval by this Board.

The President further stated that under said plan all of the outstanding First Mortgage 6% Convertible Gold Bonds of this Company shall be called for redemption on July 1st, 1929, and that he believed it would be advanta-

geous to the Company and to its stockholders to authorize the call of said bonds now.

After discussion, on motion duly made, seconded and unanimously carried, it was

RESOLVED

1. That Hendler Creamery Company, Incorporated, redeem and pay on July 1, 1929, all its issued and outstanding First Mortgage 6% Convertible 20 year Gold Bonds now unredeemed and unpaid issued under its Indenture dated as of July 1, 1926, to Commonwealth Bank of Baltimore, as Trustee.

2. That Hendler Creamery Company, Incorporated, do make, constitute and appoint Commonwealth Bank of Baltimore its attorney in its name and on its behalf and at its expense to advertise and publish notice, pursuant to the provisions of Article IV of the said Indenture dated as of July 1, 1926, of the redemption on July 1, 1929, of all bonds issued and outstanding under said Indenture now unredeemed and unpaid at their principal amount, plus accrued interest, plus a premium of 7½% of their principal amount in accordance with the terms of said Article IV of said Indenture, and to perform and do each and every act and thing required under and pursuant to Article IV of said Indenture in connection with the redemption prior to maturity of the bonds issued under said Indenture.

3. That the President and Secretary of the Company be and they hereby are authorized, empowered and directed to execute, acknowledge and deliver, for and in behalf of the Company, such power of attorney to the said Commonwealth Bank of Baltimore.

4. That the Secretary of the Company be and he hereby is authorized and directed to give notice to said Commonwealth Bank of Baltimore, Trustee, of the purpose and intention of the Company so to redeem and pay on July 1, 1929, all bonds then issued and outstanding and secured by said Indenture, and to accompany said notice with a copy of these resolutions by him certified under the seal of the Company.

RESOLVED FURTHER, That the Treasurer of this Company be and he hereby is authorized and directed to make the necessary arrangements for the deposit with said Commonwealth Bank of Baltimore of sufficient funds to pay the redemption price and accrued interest on the said bonds.

There being no further business, on motion the meeting adjourned.

(Signed) NATHAN LEBOVITZ,
Secretary.

I HEREBY CERTIFY that the foregoing is a true and correct copy of the minutes of the meeting of the Board of Directors of Hendler Creamery Company, Incorporated, held on the 15th day of May, 1929.

AS WITNESS my hand and the corporate seal of the corporation this 15th day of May, 1929.

(Signed) NATHAN LEBOVITZ,
Secretary.

EXHIBIT "C-2"

Resolutions of the Hendler Creamery Company calling for redemption prior preference stock.

EXCERPTS FROM MINUTES OF
SPECIAL MEETING OF BOARD OF DIRECTORS OF
HENDLER CREAMERY COMPANY, INCORPORATED
May 21, 1929

RESOLVED, that upon the Common and Preferred stockholders at the special meeting held for that purpose consenting to the conveyance of the business, assets, property, trade name and good will of this Company to The Borden Company, provision be made for the liquidation of all of the Prior Preference Stock of this Company in accordance with the plan of reorganization set forth in the said proposed contract with The Borden Company, either (1) by payment to the holders thereof of the re-

demption price, to wit, $107.50 per share and accrued dividends thereon accumulated to the closing of title to The Borden Company, or, if the certificates therefor are surrendered after the closing, to the date of such surrender; provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929, or (2) at the option of the holders of such Prior Preference Stock by the delivery of four shares of the full paid and non-assessable capital stock of The Borden Company of the par value of $25 per share for each three shares of the Prior Preference Stock of this Company.

The President then submitted to the meeting a form of offer to the holders of the Prior Preference Stock of the Company to be mailed in accordance with the foregoing resolution and on motion duly made, seconded and unanimously carried, it was

RESOLVED, that the form of offer presented to this meeting be and it hereby is approved and adopted, and the proper officers of this Company be and they hereby are authorized and instructed to mail a copy of such notice to each holder of Prior Preference Stock of record at the close of business on May 21st, 1929.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed agent and depository of this Company, to receive the deposited certificates of the Prior Preference Stock of this Company the holders of which may elect to surrender the same for stock of The Borden Company, as hereinbefore provided, all such certificates to be deposited not later than June 14th, 1929, and upon the closing with The Borden Company, to receive from The Borden Company the certificate for its stock required for the liquidation of the Prior Preference Stock so surrendered, together with the necessary cash for the adjustment of odd shares, as set forth in said offer, and to deliver such certificates and to pay such cash to the depositors of Prior Preference Stock who shall have elected to take Borden stock in liquidation thereof, in the proportions and amounts set forth in said offer. Thereupon all certificates for Prior Preference Stock so

surrendered shall forthwith be cancelled and such stock shall no longer be deemed outstanding for any purpose whatsoever. All certificates so surrendered shall be duly endorsed and, if the Borden stock is to be issued in the name of any other than the registered holder of the Prior Preference Stock to be exchanged therefor, then the surrendered Prior Preference Stock certificates shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of the said Commonwealth Bank of Baltimore, and accompanied by any papers that may be required to place them in transferable form together with funds at the rate of two cents per share to cover transfer taxes.

The President then submitted to the meeting a form of notice of redemption of the Prior Preference Stock of the Company and after discussion and on motion, duly made, seconded and unanimously carried, it was

RESOLVED, that this Board of Directors does hereby exercise its right to redeem all the outstanding Prior Preference Stock of this Company, and all of said stock is hereby called for redemption on July 1, 1929, at the office of Commonwealth Bank of Baltimore by paying therefor in cash $107.50 per share and all accrued and unpaid dividends thereon to said date; and this Board does hereby authorize and direct that there be forthwith mailed to each holder of record of any shares of said Prior Preference Stock at the close of business on May 21st, 1929, at his, her or its address as shown by the books of this Company, a notice in which shall be stated the intention of this Company to redeem said Prior Preference Stock in whole, and the time and place for such redemption, all as provided by the certificate of incorporation of this Company, such notice to be substantially in the form previously presented to this meeting and hereby approved; and this Board does hereby direct and declare that no dividends shall accrue on said Prior Preference Stock from and after July 1, 1929, and that on and after that date the certificates for such Prior Preference Stock as may then be outstanding shall entitle the holders thereof to no rights whatsoever except to

receive the cash redemption price of $107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

RESOLVED FURTHER, that Commonwealth Bank of Baltimore be and it hereby is appointed the agent of this Company for the purpose of the redemption of the said Prior Preference Stock and that the proper officers of this Company be and they hereby are authorized and directed to deliver to said Commonwealth Bank of Baltimore a certified list of the stockholders of record of the said Prior Preference Stock at the close of business on May 21st, 1929, and to keep said Commonwealth Bank of Baltimore advised as to any transfers of Prior Preference Stock which are made on the books between May , 1929, and the 1st day of July, 1929, and to furnish said Commonwealth Bank of Baltimore with a certified list of the holders of record of said Prior Preference Stock at the close of business on June 29, 1929.

RESOLVED FURTHER, that the transfer books for said Prior Preference Stock be permanently closed at the close of business on June 29, 1929.

RESOLVED FURTHER, that said Commonwealth Bank of Baltimore be and it hereby is directed upon receipt from The Borden Company of sufficient monies to redeem the outstanding Prior Preference Stock of this Company (to wit, all Prior Preference Stock, the holders of which shall not have elected to receive stock of The Borden Company in Liquidation thereof as hereinbefore provided) to pay out said monies on and after July 1, 1929, at the rate of $107.50 for each share of Prior Preference Stock surrendered for redemption plus accrued dividends thereon to July 1, 1929. All such payments shall be made against surrender of the certificates for said Prior Preference Stock for cancellation. Said payments shall be made by check or draft to the order of the stockholder of record as shown by the certificate surrendered for redemption or, if payment is to be made to anyone other than the

stockholder of record, then the surrendered stock certificate shall be duly endorsed in blank or accompanied by proper instruments of assignment, with signatures guaranteed to the satisfaction of said Commonwealth Bank of Baltimore and accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes. Provided that if any holder of Prior Preference Stock shall surrender the certificates therefor for redemption prior to July 1, 1929, the said Commonwealth Bank of Baltimore is hereby authorized and directed, upon receipt of the necessary monies as aforesaid, to pay forthwith to such stockholder the redemption price of his stock plus accrued dividends thereon to the date when the said monies shall be received by the redemption agent or, if such certificates are surrendered after said date, then to the date of surrender; provided, however, that no accrued dividends shall be paid for any period subsequent to July 1, 1929. Any monies received from The Borden Company for the purpose of redeeming the Prior Preference Stock of this Company and not required for that purpose shall be returned to The Borden Company.

RESOLVED FURTHER, that the officers of this Company be and they hereby are authorized and directed to take any and all such steps (including the entering into of any contract which to them may seem desirable with Commonwealth Bank of Baltimore in connection with the redemption of the said Prior Preference Stock and to do any and all such acts and things as may be necessary or advisable to carry out the purposes of the foregoing resolutions.

RESOLVED FURTHER, that the proper officers of this Company be and they hereby are directed to certify a copy of these resolutions under the seal of this Company, and to lodge the same with the said Commonwealth Bank of Baltimore together with certified specimens of certificates for the said Prior Preference Stock of this Company and a certified copy of the certificate of incorporation.

EXHIBIT "D-1"

Notice of Redemption to Trustee of First Mortgage 6% Convertible Gold Bonds of Hendler Creamery Company, Inc.

May 15, 1929

Commonwealth Bank of Baltimore,
Howard and Madison Streets,
Baltimore, Maryland.

Dear Sirs:

We hereby notify you of our intention to redeem at 107½ and accrued interest on July 1st, 1929, all of our outstanding First Mortgage 6% Convertible Twenty Year Gold Bonds, issued under an Indenture dated as of July 1st, 1926, between this Company and you as Trustee.

This notice is given under the provisions of Article IV of the Indenture, which begins on Page 47 thereof.

This Company has appointed you its agent and attorney, in its name and on behalf, and at its expense, to advertise and publish notice pursuant to the provisions of Article IV of the said Indenture of redemption on July 1st, 1929, and you are hereby authorized and empowered to promptly have such notice inserted in some daily newspaper published in Baltimore City.

You are further requested to give a similar notice by mail, postage prepaid, at least thirty days prior to July 1st, 1929, to each registered owner, if any, of bonds, at the address appearing upon the register of the bonds kept by you.

We enclose you herewith a duly certified copy of the resolutions adopted at a meeting of the Board of Directors of this Company held pursuant to waiver of notice on Wednesday, May 15th, 1929, at 9.30 o'clock in the forenoon.

Very truly yours,

HENDLER CREAMERY COMPANY,
INCORPORATED,

(Signed) L. MANUEL HENDLER,
President.

ATTEST:

(Signed) NATHAN LEBOVITZ,
Secretary.

NOTICE OF REDEMPTION

TO THE HOLDERS OF

HENDLER CREAMERY COMPANY, INCORPORATED

FIRST MORTGAGE 6% CONVERTIBLE TWENTY-YEAR GOLD BONDS.

Due July 1st, 1946.

Notice is hereby given that Hendler Creamery Company, Incorporated, by proper resolutions of its Board of Directors has elected to redeem and pay all of its outstanding First Mortgage 6% Convertible Twenty-Year Gold Bonds, due July 1st, 1946, at 107½ per centum of their face value and accrued interest on July 1st, 1929, at the office of the Commonwealth Bank of Baltimore, Baltimore, Maryland.

This notice is given in accordance with Article IV of the Indenture and Deed of Trust securing said bonds.

Said bonds should be presented at the office of the Bank, Howard and Madison Streets, Baltimore, Maryland, on July 1st, 1929, with the July 1st, 1929, and all subsequent coupons attached. From and after July 1st, 1929, interest upon said bonds will cease, and coupons representing such interest will become void.

All bonds so presented shall be in negotiable form.

HENDLER CREAMERY COMPANY,
INCORPORATED,
(Signed) L. MANUEL HENDLER,
President.

COMMONWEALTH BANK OF BALTIMORE,
Trustee.

By.....

EXHIBIT "D-2"

Notice of redemption to trustee of Prior Preference Stock of Hendler Creamery Company, Incorporated.

Baltimore, Md., May 22nd, 1929.

To the Holders of the Prior Preference Stock
of Hendler Creamery Company, Incorporated:

Hendler Creamery Company, Incorporated, has entered into a contract with The Borden Company, pursuant to which the two companies will be merged and in connection therewith The Borden Company will, among other things, and subject to certain conditions set forth in the said contract, provide for the liquidation of the Prior Preference Stock of this Company, either

(1) By the payment to the Prior Preference Stockholders of the sum of $107.50 per share (being the redemption price of the said stock) plus accrued and unpaid dividends thereon to the date when the transaction with The Borden Company is closed, or, if the certificates therefor are surrendered after the closing, to the date of such surrender, provided that in no event will accrued dividends be paid for any period subsequent to July 1, 1929; or, at your option

(2) By the issuance of four fully paid shares of stock of The Borden Company, of the par value of $25.00 per share, in exchange for every three shares of Prior Preference Stock of this Company. No fractional shares of The Borden Company Stock will be issued, and accordingly where holdings of Prior Preference Stock are not divisible by three, adjustments will be made for the odd share or shares as follows: For each three-fourths of a share not so divisible, one full share of Borden Company stock will be issued and for the remaining one-fourth of a share the depositor will receive one-fourth of a whole share's redemption price, to wit the sum of $26.88 plus one-fourth of the accrued dividend on such share figured as above stated.

The directors of your Company believe that this offer of exchange to the holders of the Prior Preference Stock is a highly advantageous one. The par value of The Borden Company stock has recently been reduced from $50 per share to $25 per share, each stockholder receiving two

shares of the new stock for each share of the old stock. The old stock has sold on the New York Stock Exchange during the present calendar year as high as $203.75 per share, while the low so far for 1929 is on the basis of the old stock, $174.50 per share. The closing quotation for the new $25 par stock on May 20th, 1929, was $91.00 per share. At this price the value of four shares of Borden stock is considerably greater than the redemption price of three shares of the Prior Preference Stock, even if accrued dividends be added. The Borden Company has been paying dividends on its old $50 par stock at the rate of $6 per share per annum.

Pursuant to action of the Board of Directors of your Company, the Prior Preference Stock has been called for redemption on July 1, 1929, and notice of such redemption is enclosed herewith.

Any Prior Preference Stockholder who desires to avail himself of the opportunity to receive stock of the Borden Company should sign the enclosed form and deliver it, together with the certificate or certificates for his stock to Commonwealth Bank of Baltimore, which has been appointed the Redemption Agent for the Prior Preference Stock.

All certificates must be deposited not later than 2 o'clock P. M. June 14th, 1929, and unless so deposited the holder thereof will be deemed to have waived his right to receive the stock of The Borden Company. It is expected that the stock of The Borden Company will be issued to the depositing Prior Preference Stockholders on or about June 21, 1929. The first quarterly dividends therefore which stockholders accepting the Borden stock will receive will be that of September 1st, 1929.

Any Prior Preference Stockholder who prefers to receive redemption price of his stock should also surrender his certificate or certificates therefor to Commonwealth Bank of Baltimore, the Redemption Agent, and will receive therefor $107.50 per share plus accrued dividends to the date of surrender, unless such certificates are surrendered prior to the closing of the transaction with The Borden Company, in which case he will receive, as soon as the closing has taken place, the redemption price of his stock plus accrued dividends to the date of closing.

All rights to accrued dividends on the Prior Preference Stock will cease on July 1, 1929, and Stockholders failing to surrender their certificates prior to that date will receive accrued dividends only to July 1, 1929.

All certificates surrendered, whether for the purpose of receiving The Borden Company stock or for the purpose of receiving the redemption price, should be endorsed, and if the cash is to be paid to, or the certificates of The Borden Company Stock issued in the name of, anyone other than the registered stockholder, the endorsement of the certificates must be guaranteed to the satisfaction of Commonwealth Bank of Baltimore and the surrendered certificates must be accompanied by any papers that may be required to place them in transferable form, together with funds the rate of two cents per share, to cover the transfer taxes thereon.

All Prior Preference Stockholders desiring to take advantage of this offer are urged to deposit their certificates with Commonwealth Bank of Baltimore as soon as possible after receipt hereof and not later than June 14th, 1929.

HENDLER CREAMERY CO., INC.

By L. MANUEL HENDLER,

President.

NOTICE OF REDEMPTION.

To the Holders of Prior Preference Stock
of Hendler Creamery Company, Incorporated:

NOTICE IS HEREBY GIVEN that at a meeting of the Board of Directors of HENDLER CREAMERY COMPANY, Incorporated, a corporation of the State of Maryland, duly held on May 21st, 1929, the right to redeem the whole of the Prior Preference Stock of the Company was by resolution duly exercised, and the whole of said stock called for redemption on July 1, 1929, on which date it is the intention of the Company to redeem the said stock, at the office of COMMONWEALTH BANK OF BALTIMORE, Howard and Madison Streets, in the City of Baltimore, Maryland, which is hereby ap-

pointed Agent of the Company for the purpose of such redemption, by the payment therefor in cash of the sum of $107.50 per share and an amount equal to all accrued and unpaid quarterly dividends thereon to said date. In accordance with such resolution of the Board of Directors passed in pursuance of the provisions of the certificate of incorporation of the Company, no dividends will accrue on said Prior Preference Stock from and after July 1, 1929, and on and after July 1, 1929, the certificates for such Prior Preference Stock will entitle the holders thereof to no rights whatsoever except to receive, upon surrender of said certificates at the office of COMMONWEALTH BANK OF BALTIMORE the cash redemption price of $107.50 per share and all accrued and unpaid dividends thereon to July 1, 1929, but without interest.

Payment of the redemption price and accrued dividends will be made by check or draft to the order of the registered Prior Preference Stockholder as shown by the certificate surrendered for redemption, which must be duly endorsed. If payment is to be made to anyone other than the registered stockholder, the stock certificate must be duly endorsed or accompanied by proper instruments of assignment; signature must be guaranteed to the satisfaction of COMMONWEALTH BANK OF BALTIMORE, and the surrendered certificate must be accompanied by any papers that may be required to place it in transferable form, together with funds at the rate of two cents per share to cover transfer taxes.

All transfers of record must be completed before the close of business on June 29, 1929, as at that time the transfer books for said Prior Preference Stock will be permanently closed.

By order of the Board of Directors.

HENDLER CREAMERY COMPANY,
INCORPORATED,
By NATHAN LEBOVITZ,
Secretary.

Dated: March 21, 1929.

....., 1929.

To COMMONWEALTH BANK OF BALTIMORE,
BALTIMORE, MARYLAND.

The undersigned, Prior Preference Stockholder of Hendler Creamery Company, Incorporated, herewith deposits with you certificates for.....shares of said stock. Pursuant to the offer outlined in the letter from the Company to the Prior Preference Stockholders, dated May 22nd, 1929, the undersigned elects to receive for said stock a certificate for the capital stock of The Borden Company for such number of shares as shall equal four shares of The Borden Company Stock, of the par value of $25 per share, for every three shares of Prior Preference Stock of Hendler Creamery Company, Incorporated, deposited by the undersigned. It is understood that no fractional shares of Borden Company stock will be issued and that if the number of shares of Prior Preference Stock deposited by the undersigned is not divisible by three, adjustment is to be made for the odd share or shares in the manner stated in the said letter to the Prior Preference Stockholders of May 22nd, 1929.

.....

EXHIBIT "E"

Proceedings of the Directors of The Borden Company adopting resolution authorizing its officers to execute the agreement with Hendler Creamery Company, Incorporated.

THE BORDEN COMPANY.

PROCEEDINGS OF DIRECTORS AUTHORIZING THE PURCHASE OF HENDLER CREAMERY COMPANY, INCORPORATED.

The President reported to the Board that representatives of the Company in consultation with him had been in negotiations for the purchase of substantially all the assets and business of Hendler Creamery Company, Incorporated (hereinafter called "Hendler Creamery"), a corporation of the State of Maryland, which conducts directly or through subsidiaries, an ice cream business

in the City of Baltimore and the surrounding territory. Said Company owns the entire issued and outstanding capital stock of three subsidiary corporations, namely Clover Ice Cream Company, Horn Ice Cream Company and Supreme Ice Cream Company.

The President stated that as a result of these negotiations an agreement had been reached with Messrs. L. Manuel Hendler and Nathan Lebovitz, who own more than 90% of the Common Stock and more than 90% of the Preferred Stock and control more than 20% of the Prior Preference Stock of Hendler Creamery, and that a contract was in course of preparation providing for the purchase by this Company of the entire assets and business of Hendler Creamery and its subsidiary companies. The President stated to the Board that the purchase price for the said assets and business, including the assets and business of the subsidiary corporations, would be by the issuance of 43,358 shares of the full paid and non-assessable capital stock of this Company of the par value of $50 per share, or, if the par value of the shares of this Company's stock be reduced, as is now contemplated, 87,716 shares thereof of the par value of $25 per share, having in either case an aggregate par value of $2,167,900; by providing for the liquidation of all of the Prior Preference Stock of Hendler Creamery (including any Prior Preference Stock which may be issued after the date of said contract and prior to May 21, 1929, on the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either by payment of $107.50 per share and accrued dividends in cash or by the issuance of two shares of Borden stock of the par value of $50 each in liquidation of three shares of said Hendler Creamery Prior Preference Stock (the ratio to be correspondingly adjusted if the par value of the Borden shares be reduced) and by the assumption of the liabilities of Hendler Creamery (including any bank liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding First Mortgage Bonds) excepting liability for capital stock and certain tax liabilities.

The President stated that Hendler Creamery Company, Incorporated, has outstanding $675,000 principal amount of First Mortgage 6% Convertible 20-year Gold

Bonds. The First Mortgage Bonds are convertible into Prior Preference Stock on the basis of one share of such stock for each $100 principal amount of bonds. The right to convert, if the bonds are called for redemption, ceases on the day prior to the passage of proper resolutions calling the bonds, and under the proposed contract such resolutions will be adopted not later than May 21, 1929. Hendler Creamery Company, Incorporated, has outstanding 12,000 shares of Prior Preference Stock, bearing dividends at the rate of $7 per share per annum, so that if all the holders of such stock elect to take payment in cash the amount payable to them would be approximately $1,376,550, or if they all should elect liquidation in Borden stock, the issuance of 8,400 shares of the par value of $50 each, or 16,800 shares of the par value of $25 each, would be required, plus such additional amount of cash or of the Company's stock as may be necessary to provide for the liquidation of any Prior Preference Stock of Hendler Creamery Company which may be issued prior to May 21, 1929, on the conversion of the First Mortgage 6% Convertible 20 Year Gold Bonds of Hendler Creamery.

The President further stated that the acquisition of the assets and business of Hendler Creamery and its subsidiaries would give the Company an entry into territory which it is not presently engaged in a similar business; that he considered the terms agreed upon fair and the proposed acquisition a desirable one and advantageous to the Company and he recommended that the officers of the Company be authorized to execute preliminary and final contracts covering the purchase substantially on the terms agreed to and reported to the meeting and to complete the purchase in accordance with such contract or contracts as may be executed. He further there stated that, based upon the reports made to him, he was satisfied that the net cash value of the properties and business to be acquired will be well in excess of the par value of the stock of the Company to be issued therefor, plus any amounts to be paid and liabilities to be assumed by this Company.

General discussion then ensued.

On motion duly made and seconded, and by the unanimous vote of all the Directors present, constituting

a majority of the entire Board and a quorum, the following preambles and resolutions were duly adopted:

WHEREAS, the President of the Company has reported to this Board the conclusion of negotiations for the purchase by this Company of the entire assets and business of Hendler Creamery Company, Incorporated (hereinafter referred to as "Hendler Creamery") and its subsidiary companies; and

WHEREAS, from the reports made to this Board, it appears that said Hendler Creamery directly and through wholly owned subsidiaries is engaged in the ice cream business in the City of Baltimore and the surrounding territory. The acquisition of the said assets and business will afford the Company entry into a territory where it does not now engage in a similar business and said acquisition will, in the opinion and judgment of this Board, be advantageous to and in the interests of this Company. For the assets and business so to be acquired by it, this Company is to pay by the issuance of 43,358 shares of the full paid and non-assessable capital stock of this Company of the par value of $50 per share, or, if the par value of the shares of said stock be reduced, as is now contemplated, 86,716 shares thereof of the par value of $25 per share; by providing for the liquidation of all of the Prior Preference Stock of Hendler Creamery (including any shares of Prior Preference Stock which may be issued after the date hereof and prior to May 21, 1929, upon the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either by payment of $107.50 per share and accrued dividends in cash or by the issuance of full paid and non-assessable shares of the capital stock of this Company in the ratio of two shares of the par value of $50 each or four shares of the par value of $25 each for three shares of said Hendler Creamery Prior Preference Stock; and by the assumption of the liabilities of Hendler Creamery (including any bank liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding First Mortgage Bonds) except liability for capital stock and certain tax liabilities.

In the opinion and judgment of this Board, the considerations to be received by this Company for its shares of stock to be issued as aforesaid are reasonably worth in money at a fair bona fide valuation well in excess of the par value of the stock to be issued therefor over and above all sums of money to be paid by this Company and all liabilities to be assumed by it; and

WHEREAS, this Board is of the opinion that even considering the present market price of the stock of The Borden Company, it will be to the advantage of this Company to make said purchase; now, therefore, be it

RESOLVED: (1) That the President or a Vice-President of this Company be and he hereby is authorized and empowered in the name and on behalf of this Company to execute such preliminary and/or final contracts with the controlling stockholders of Hendler Creamery or with Hendler Creamery itself, providing for the purchase by this Company of the entire assets and business of Hendler Creamery for a price to be paid by the issuance of 43,358 shares of the par value of $50 each of the full paid and non-assessable capital stock of this Company, or, if the par value of said shares be reduced, as is now contemplated, 86,716 shares thereof, of the par value of $25 each; by providing for the liquidation of 12,600 shares of Prior Preference Stock of Hendler Creamery (plus such additional shares of Prior Preference Stock as may be issued after the date hereof and prior to May 21, 1929 on the conversion of any of the First Mortgage Bonds of Hendler Creamery) at the option of the holders thereof, either (a) by the payment of the sum of $107.50 per share plus accrued dividends in cash, or (b) by issuing additional shares of the capital stock of this Company in liquidation of said Prior Preference Stock, in the ratio of two shares of this Company's capital stock of the par value of $50 each, or four shares of this Company's capital stock of the par value of $25 each for three shares of said Hendler Creamery Prior Preference Stock, and by the assumption of the liabilities of said Hendler Creamery and its subsidiaries (including any bank

liability which might arise as a result of the necessity of Hendler Creamery borrowing funds sufficient to purchase and/or retire its outstanding Firt Mortgage Bonds) but excepting liability for capital stock, tax liabilities accruing by reason of the sale by Hendler Creamery of its assets and business to this Company and/or by reason of any business transacted by Hendler Creamery or its subsidiaries subsequent to the date of the conveyance of the said assets and business to this Company, and excepting additional income and/or excess profits taxes in respect of business transacted and/or income accrued prior to January 1, 1929, and excepting legal fees of counsel for Hendler Creamery in connection with the said contract and the transfer thereby provided; that said contract or contracts may contain such other or further terms and provisions as may be approved by the officer executing the same, his execution thereof to be conclusive evidence of such approval; that upon the execution and delivery of said contract or contracts, the executive officers of this Company be and they hereby are authorized and instructed to do all such acts and things and to execute all such instruments and papers as shall be necessary or in their judgment expedient in order to perform the said contract or contracts on the part of this Company and to issue certificates for the shares of the capital stock of this Company upon the terms and in the amounts hereinbefore authorized and that all shares of the capital stock of this Company so issued shall, upon the issuance thereof, be and be deemed to be full paid and not subject to any call or assessment.

(2) That the authority of The Seaboard National Bank of the City of New York Transfer Agent, and of Bankers Trust Company, Registrar, respectively, of the capital stock of this Company, be and it hereby is extended to cover the additional shares of the stock of this Company, the issuance of which is authorized by these resolutions.

(3) That application be made to the New York Stock Exchange for the listing of 51,758 shares of the par value of $50 each, or 103,516 shares of the par value of $25 each (plus such additional amount

of the Company's stock as may be necessary to provide for the liquidation of any Prior Preference Stock of Hendler Creamery Company, Incorporated, which may be issued prior to May 21, 1929, on the conversion of any of the First Mortgage 6% Convertible 20-Year Gold Bonds of Hendler Creamery Company, Incorporated) upon official notice of the issuance in payment for the assets and business of Hendler Creamery Company, Incorporated; and that Robert Struthers, Director; George M. Waugh, Jr., Vice-President; William P. Marsh, Secretary and Treasurer, and Donald Mackenzie, of counsel, of this Company or any one or more of them be designated by this Company to appear before the Committee on Stock List of the New York Stock Exchange with authority to make such changes in the said application or in any agreements relative thereto as may be necessary to conform with requirements for stock listing.

(4) That the executive officers of this Company be and they hereby are authorized if in their judgment such course be advisable, to cause to be formed such subsidiary company or companies to take over and operate the properties and business to be acquired by this Company from Hendler Creamery and its subsidiaries and/or to continue the existence of any of the existing subsidiaries of said Hendler Creamery and to make all such arrangements with respect to any of said matters as in their judgment may be necessary or advisable.

STATE OF NEW YORK, }
COUNTY OF NEW YORK } ss:

I, WILLIAM P. MARSH, Secretary of THE BORDEN COMPANY, a corporation of the State of New Jersey, do hereby certify that the foregoing are true and correct extracts of the proceedings taken at a meeting of the Board of Directors of The Borden Company, duly called and held at the office of the Company, No. 350 Madison Avenue, New York City, on April 17, 1929. I do further certify that a majority of the Directors, constituting a quorum, were present at said meeting and voted in favor of the adoption of the foregoing preambles and resolutions.

WITNESS my hand and the seal of the Company this 29th day of April, 1929.

(Signed) W. P. MARSH,
Secretary.

EXHIBIT "F"

Letter dated June 27, 1929, from The Borden Company to the Commonwealth Bank giving instructions and enclosing check for retirement of the First Mortgage Gold Bonds of Hendler Creamery Company, Incorporated.

June 27, 1929.

National Commonwealth Bank of Baltimore,
Baltimore, Maryland.
Gentlemen:

Referring to the bonds of the Hendler Creamery Company which have been called for redemption on July 1st, 1929, we have today deposited in the Guaranty Trust Company of New York, for credit to the account of your bank, the sum of $381,225.00, being an amount sufficient for the redemption of $345,000 face value of bonds, plus $25,875 covering premium of $7.50 per $100 bond, and accrued interest to July 1, 1929, of $10,350.

In addition to the above you hold for our account $127,000 face value of bonds, bought in open market, $22,000 face value of bonds owned by Sharpless-Hendler Company, and $7,000 face value of Treasury Bonds. This letter will be your authority to cancel said bonds on July 1st without payment.

We shall be glad to have you render us a bill covering your charges in connection with this transaction, which upon its receipt, will be given prompt attention.

Yours very truly,

THE BORDEN COMPANY,
Treasurer.

WPM/MF

In addition to the photostatic copy of correspondence enclosed, as mentioned above, we are attaching hereto photostatic copy of checks of The Borden Company, as follows:

Check Number	Date	Payable to:	Drawn on:	Amount
637	May 24, 1929	Guaranty Trust Co. for transfer to Commonwealth Bank of Baltimore.	National Bank of Commerce	$130,867.40.
110538	June 5, 1929	Sharpless-Hendler Ice Cream Company, Inc.	The Seaboard Nat'l Bank	21,875.00
111691	July 10, 1929	Sharpless-Hendler Ice Cream Company, Inc.	The Seaboard Nat'l Bank	330.00
643	June 27, 1929	Guaranty Trust Co. Cr. account of Commonwealth Bank of Baltimore.	National Bank of Commerce	381,225.00
			Total	$534,297.40

BORDEN'S.

Check

111691

Date	Voucher No.	Pay to the order of	Amount
July 10, 1929	Treas.	Sharpless Hendler Ice Cream Co.	$330.00

.....Three Hundred thirty and no/100.....Dollars

THE BORDEN COMPANY.

PAID

The Seaboard National Bank
Uptown Branch
24 E. 45th Street, New York

Auditor
ELH

On reverse side of check
For Deposit
Sharpless-Hendler
Cream Co.
Pay to the order of
Any Bank, Banker or Trust Co.
Security Trust Company
62-8 62-8
Wilmington, Del.
T. J. Mowbray, Treasurer.

Received payment
Through New York Clearing House
Prior endorsements guaranteed
July 13, 1929
1-23 Guaranty Trust Co. of New York
Successor to
Bank of Commerce in New York
Formerly
Nat'l Bank of Commerce in New York
Transit Department

BORDEN'S
Established 1857
New York

Check
637

Date	Voucher No.	Pay to the order of	Amount
May 24, 1929	Treas.	Guaranty Trust Company	$130,867.40

One hundred thirty thousand eight hundred sixty-seven 40/100 Dollars

THE BORDEN COMPANY

To
National Bank of Commerce
in New York

J. D. Baum,
Treasurer.

Audited
GB

Cancelled—5-27-29

BORDEN'S
Established 1857
New York

Check
643

Date	Voucher No.	Pay to the order of	Amount
June 27, 1929	Treas.	Guaranty Trust Company Cr. Acct. National Commonwealth Bank of Baltimore	$381,225.00

Three hundred eighty-one thousand two hundred twenty-five and no/100.....Dollars

THE BORDEN COMPANY,

To
National Bank of Commerce
in New York

J. D. Baum,
Treasurer.

Audited
AWV

Cancelled 6-28-29

BORDEN'S
Established 1857
New York

Check
110538

Date	Voucher No.	Pay to the order of	Amount
June 5, 1929	Treas.	Sharpless Hendler Ice Cream Company	$21,875.00

PAID
6-10-29

Twenty-one thousand eight hundred seventy-five and no/100 Dollars

THE BORDEN COMPANY,

The Seaboard National Bank
Uptown Branch
24 E. 45th St., New York

J. D. Baum,
Authorized signature.

Audited
HWD

On Reverse Side
For Deposit—Sharpless-Hendler Ice Cream Co.
Pay to the order of any Bank, Banker or Trust Co.
Prior endorsements guaranteed
Security Trust Company
62-8 62-8
Wilmington, Del.
T. J. Mowbray, Treasurer
Jun 17, '29

Received payment through New York Clearing House
Prior endorsements guaranteed
Jun 18, 1929
1-23 Guaranty Trust Co. of N. Y. 1-23
Successor to
Bank of Commerce in New York
formerly
Nat'l Bank of Cemmerce in New York
Transit Dept.

EXHIBIT "G"

Report of the Internal Revenue Agent in charge (Baltimore, Maryland) dated March 31, 1931, covering examination of 1929 income tax return of creameries, incorporated (formerly Hendler Creamery Company, Incorporated), proposed additional tax in the amount of $11,852.09.

TREASURY DEPARTMENT

INTERNAL REVENUE SERVICE

FGMcF

Baltimore, Md.
May 11, 1931

OFFICE OF

Internal Revenue
Agent in Charge.
Creameries, Incorporated In re:
1100 E. Baltimore Street,
Baltimore, Md. Date of report: March 31, 1931
Years covered: 1929

Gentlemen:

There is attached a statement of adjustments which this office proposes to recommend, affecting your income

tax liability. If the adjustments suggested are satisfactory, and you do not desire to file a protest, the inclosed agreement form should be signed by you and forwarded to this office. Interest is payable on deficiencies found due as set forth on the attached Form 882.

If you do not agree with the conclusions set forth in the inclosed statement it is desired that every opportunity be afforded you to present to this office any objections or additional information. You are accordingly granted thirty days from date of this letter within which you may, if you so desire, protest the proposed adjustments. The protest and any additional statement of facts must be submitted to this office, executed in triplicate under oath, and should contain the following information:

(a) The name and address of the taxpayer (in the case of an individual the residence, and in the case of a corporation the principal office or place of business); (b) in the case of a corporation the name of the State of incorporation; (c) the designation by date and symbol of the letter advising of the proposed deficiency with respect to which the protest is made; (d) the designation of the year or years involved and a statement of the amount of tax in dispute for each year; (e) an itemized schedule of the findings to which the taxpayer takes exception; (f) a summary statement of the grounds upon which the taxpayer relies in connection with each exception; (g) in case the taxpayer desires a hearing, a statement to that effect; and (h) in case the protest is prepared or filed by an attorney or agent it shall have thereon a statement signed by such attorney or agent showing whether or not he prepared it and whether or not the attorney or agent knows of his own knowledge that the facts therein are true.

If a protest is filed it will be given careful consideration in this office before the recommendations are forwarded to Washington for action. In the event that you do not protest within the thirty-day period, the case will be forwarded immediately thereafter to the Bureau at Washington for review.

In the event the recommendations are not approved upon review in Washington, you will be notified and given

opportunity to discuss the changes with this office, or should you fail to protest to this office, *any protest which you may subsequently file with Washington will be referred to this office for consideration.*

If a deficiency is indicated no remittance should be made until you receive notice of assessment from the Collector of Internal Revenue for your district.

Please acknowledge receipt by return mail.

Respectfully,

E. E. HEARN,

Internal Revenue Agent in Charge.

Inclosures:

Statement of adjustments

Forms 882 and 870

WAIVER OF RIGHT TO FILE A PETITION WITH THE UNITED STATES BOARD OF TAX APPEALS

The undersigned taxpayer hereby waives the right to file a petition with the United States Board of Tax Appeals under Section 274 (a) of the Revenue Act of 1926, and/or Section 272 (a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in income tax for the calendar year ended December 31, 1929 in the sum of $11,852.09 together with interest as provided by law.

.....
Name

.....
Address

Date..... By.....

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your income tax liability as indicated above.

Where the taxpayer is a corporation, the agreement shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which, the seal, if any, of the corporation must be affixed.

EXCERPTS FROM REPORT OF INTERNAL REVENUE AGENT IN CHARGE MARCH 31, 1931

Page 6—"(e) Unamortized Bond discount on bonds redeemed July 1, 1929. It is the contention of the examining officer that the payment of the bonds of the Hendler Creamery Company, Inc., was assumed by the Borden Company when they acquired the assets and assumed the liabilities of the Hendler Creamery Co., Inc., and that such unamortized discount and bond expense followed the bond issue.

Prior to date of call and redemption of the bonds, the bondholders exchanged 174,000.00 of the bonds for preferred stock of the taxpayer. The unamortized discount on these bonds amounted to 10,412.50, which is included in the 40,755.11 claimed as a deduction. See Exhibit F."

Page 7—"(h) Premium on Bonds retired—When the bonds of The Hendler Creamery Company were redeemed by The Borden Company on July 1, 1929 (they acquiring all the assets and liabilities on July 21, 1929), they paid to the stockholders a premium of 26,569.40. It is contended by the examining officer that this premium is not a deduction to the vendor but to The Borden Company who were liable for the redemption of the bonds and such premiums that were due at redemption date."

Page 18—"Computation of Tax—Year ended 12/31/29.

INCOME TAX

Net income for taxable year	109,879.87
Less net loss	2,133.64
Net income	107,746.23
Balance subject to tax	107,746.23
Income tax 11%	11,852.09
Total tax assessable	11,852.09
Total previously assessed	None
Additional Tax to be assessed	11,852.09

Schedule 7-A

EXPLANATION OF ITEMS

The taxpayer filed a tentative return for the year 1929 in which he paid a tentative quarterly payment of 1,605.59. The proposed assessment of 6,422.34 was not placed on the collector's books as an assessment, but the payment of 1,605.59 was treated merely as an open advance payment."

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EXHIBIT "F"

ANALYSIS OF DISCOUNT ON FIRST MORTGAGE BONDS

			Principal Balance	Discount Balance
July 1,	1926,	Bonds issued	700,000.00	49,000.0
1926		Bonds redeemed 18,000.00	682,000.00	
1926		Unamortized Disc. on bonds redeemed	1,244.25	47,755.7
1926		Annual discount chg.	1,209.27	46,546.4
1927		do	2,387.04	44,159.4
1928		Bonds redeemed 7,00.00	675,000.00	
1928		Unamortized disc. on bonds redeemed	432.83	43,726.6
1928		Annual disc. chg.	2,380.89	41,345.7
1929		Unamortized disc. on bonds redeemed Prior to date of final Redemption date 7/1/29	10,412.50	30,933.2
1929		Disc. Jan. 1, Mch. 31	590.61	30,342.6
1929		" Apr. 1, May 14	376.24	29,966.3
1929		Bonds redeemed		
		Apr. 17, 1929 25,000.00	650,000.00	
		Apr. 25, 1929 2,000.00	648,000.00	
		May 1, 1929 3,000.00	645,000.00	
		May 14, 1929 144,000.00	501,000.00	
		July 1, 1929 501,000.00	—0—	

DATE OF BOND REDEMPTION

Sept. 15, 1926	15,000.00	
Sept. 18, 1926	1,000.00	
Sept. 20, 1926	2,000.00	18,000.00
Oct. 31, 1928		7,000.00
Apr. 17, 1929	25,000.00	
Apr. 25, 1929	2,000.00	
May 1, 1929	3,000.00	
May 14, 1929	144,000.00	174,000.00
July 1, 1929		501,000.00
Total bonds issued		700,000.00

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EXHIBIT "G"

AMORTIZATION OF BOND DISCOUNT

Year ended 12/31/29

Unamortized Bond Discount Jan. 1, 1929			41,345.72
Less			
Monthly charges			
January		196.87	
February		196.87	
March		196.87	590.61
April	98.43		
April	95.23	193.66	
May	94.51		
May	73.45	167.96	
June		146.91	
July		146.91	
August		146.91	
September		146.91	
October		146.91	
November		146.91	
December		146.91	1,389.99
Unamortized discount December 31, 1929			39,365.12

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EXHIBIT "H"

AMORTIZATION OF BOND EXPENSE

Year ended 12/31/29

			Balance
Unamortized Bond Expense Jan. 1, 1929			10,751.30
Less			
Monthly charges			
January	51.19		10,700.00
February	51.19		10,648.92
March	51.19	153.57	10,597.73
April	24.70		
April	24.52	49.22	10,548.51
May	24.30		
May	18.00	42.30	10,506.21
June		38.00	10,468.21
July		38.00	10,430.21
August		38.00	10,392.21
September		38.00	10,354.21
October		38.00	10,316.21
November		38.00	10,278.21
December		38.00	10,240.21

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STATEMENT OF TOTAL TAX LIABILITY.

Year	Tax Previously Assessed	Deficiency	Correct Tax Liability
1929	—0—	11,852.09	11,852.09

EXHIBIT "H"

Protest dated June 8, 1931, to the report of the Internal Revenue Agent in charge, dated March 31, 1931, filed by Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated).

UNITED STATES TREASURY DEPARTMENT

INTERNAL REVENUE AGENT IN CHARGE

Baltimore, Md.

In the Matter of Federal Income Tax Liability of

CREAMERIES, INCORPORATED
(Formerly Hendler Creamery Company, Incorporated)

For the Year 1929

—

Protest Against Agent's Report
Dated March 31, 1931

Sir:

The undersigned, Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), hereby protests the findings, hereinafter specified, contained in the Revenue Agent's report dated March 31, 1931, a copy of which was mailed by you under date of May 11, 1931.

The taxpayer was a corporation organized under the laws of the State of Maryland on August 10, 1926, which had its principal place of business at 1100 Block East Baltimore Street, Baltimore, Maryland. On June 25, 1929, the name of the company was changed from Hendler Creamery Company, Incorporated, to Creameries, Incorporated, and on August 5, 1930, the corporation was dissolved. The year involved, as stated above, and the amount of additional tax proposed by the Agent are as follows:

Year	Additional Tax
1929	$11,852.09

The schedule of findings to which exception is taken, and the statement of the grounds upon which such protest is based are hereinafter stated.

Point I

Schedule 2 (e)—Unamortized Discount..... $40755.11
Schedule 2 (h)—Premium on Bonds Retired $26,569.40

The Agent has disallowed as deductions from income the above items with the explanation that such disallowance was being made for the reason that the bond indebtedness was assumed by The Borden Company, and that such unamortized bond discount and premium followed the bond issue.

The contention of the taxpayer, relying upon Article 68 of Regulations 64, is that the unamortized bond discount and the premium on bonds retired in 1929 constituted an expense for that year deductible by the taxpayer even though, pursuant to contract, the money for the return of the bonds was actually furnished by another corporation, to wit: The Borden Company. However, since bonds of the par value of $174,000 were converted into preferred stock shortly prior to the redemption of the remaining bonds, it is conceded, under the authority of IT 2347, CB June 1927, page 86, that the taxpayer loses the benefit of the deduction of that part of the unamortized bond discount applicable to such of the bonds as were converted. The amount of such unamortized bond discount was $10,412.50. Accordingly, the amount of unamortized bond discount to which the taxpayer is entitled should be reduced from $40,755.11, as originally claimed, to $30,342.61.

Under date of April 16, 1929, a preliminary contract was made for the purchase by The Borden Company of all of the assets and business of Hendler Creamery Company, which, with its subsidiaries, was engaged in the creamery and ice cream business in and about the city of Baltimore. At that time Hendler Creamery Company had outstanding common stock, preferred stock, prior preference stock and first mortgage bonds, which bonds had a total par value of $675,000. These bonds were secured by a mortgage made to Commonwealth Bank of Baltimore, as Trustee, the mortgage covering certain property of Hendler Creamery Company. The bonds had been issued at a discount, and they contained a provision that if redeemed prior to their due date, the bondholders would be entitled to payment at the rate of 107½ per cent. In this preliminary contract the consideration agreed to be paid by The Borden Company included sufficient cash to take care of the redemption of the Prior Preference Stock, it being understood that the holders of such Prior Prefer-

ence Stock would be given an opportunity to exchange their holdings for stock of The Borden Company and that those unwilling to make such exchange would be entitled to receive cash. The consideration also included a certain number of shares of the capital stock of The Borden Company to be distributed ratably to the common and preferred stockholders. As is usual in a case of such "statutory reorganizations," provisions was further made that The Borden Company would take over the assets of the vendor company "subject to all liabilities of your Company and of its subsidiaries as they exist at the date of closing of this transaction," with certain exceptions not herein material.

No specific mention was made of the assumption of the bonded indebtedness of Hendler Creamery Company, and the clause set off in quotation marks above is all that was contained in the preliminary contract with reference to the liabilities of the vendor company, including its liability on the bonds.

On May 21, 1929, a formal contract was entered into between Hendler Creamery Company and The Borden Company, carrying out in the main the provisions of the preliminary contract above referred to. As to the liabilities of the vendor company, this contract, under Section Second provided as follows:

> "You shall effect a reorganization so that in exchange for the assignment, transfer and conveyance to us of your said assets and business and, should we so elect, of the assets and businesses of the subsidiary companies, or any of them, we will:
>
> (c) Assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder."

No other provision is contained in the contract with reference to the assumption by The Borden Company of the vendor company's liability on its outstanding bonds. However, under Section THIRD of the contract Hendler Creamery Company agreed to take "all such proceedings as shall be necessary to call your outstanding first mortgage six per cent. convertible gold bonds for redemption on July 1, 1929, "and the vendor company agreed to

cause the necessary resolutions calling the first mortgage bonds for redemption to be adopted and also to see that the first mortgage securing the bonds was duly satisfied before the closing of the contract.

The indenture under which the bonds were issued contained the following provision with respect to their redemption:

> "Section 2. Whenever the Company shall elect to redeem any bonds, it shall in each case give notice of such redemption by publication at least once a week for four successive calendar weeks (in each instance upon any day of the week) prior to the interest payment date on which such redemption is to be made, the first publication to be made not less than thirty days nor more than sixty days prior to the date fixed for redemption, in one daily newspaper of general circulation, published in the City of Baltimore, State of Maryland, stating such election on the part of the Company, the redemption date and the redemption price, and stating that the interest on the bonds to be redeemed will cease to accrue on such redemption date and requiring that on said date such bonds be presented in negotiable form for redemption at the principal office of the Trustee in the City of Baltimore, State of Maryland."

The resolution calling for the redemption of the bonds was adopted by the Board of Directors of Hendler Creamery Company. The call for redemption was issued by and in the name of Hendler Creamery Company. The Hendler Creamery Company arranged for the discharge of the lien of the mortgage. The redemption date was fixed by the Hendler Creamery Company as July 1, 1929. At the time of the closing of the contract, which took place on June 21, 1929, all acts and things necessary to redeem the bonds had been done, except that the necessary funds had not at that time been deposited with the Trustee nor, of course, turned over by the Trustee to the bondholders.

At the time the final contract was entered into it was contemplated that Hendler Creamery Company might have to increase its liabilities for certain purposes and provision was made that in such event the repayment of

such obligations would also be borne by The Borden Company. Among such additional obligations the following was mentioned under Section THIRD of the agreement: "Money borrowed and/or paid out by your company to purchase or redeem its First Mortgage Bonds." In other words, the way was open for the vendor company to raise sufficient funds to redeem its bonds without resort in the first instance to The Borden Company.

Shortly after the closing of the contract and prior to July 1, 1929, The Borden Company deposited with the Trustee sufficient funds to redeem the outstanding bonds. With that exception The Borden Company played no part in either calling the bonds for redemption or in redeeming them.

It is well settled under the Bureau practice that unamortized bond discount and premiums on bonds constitute deductible expenses for the year in which the bonds are redeemable or retired. This proposition is not disputed by the Revenue Agent. His position, as stated above, is that the deductions should be allowed to The Borden Company because it "assumed" the obligation, and not by the Hendler Creamery Company. This contention on the part of the Revenue Agent is, in our opinion, clearly untenable, as the following considerations will demonstrate.

The agreement by which The Borden Company assumed and agreed to pay the indebtedness and liabilities of Hendler Creamery Company did not in any way release Hendler Creamery Company from its obligation. The bondholders were in no sense parties to this agreement and they were, accordingly, not bound by it.

When The Borden Company deposited with the Trustee sufficient funds to redeem the bonds it simply provided the Hendler Creamery Company with the means of discharging an obligation of the Hendler Creamery Company. It cannot be seriously urged that the effect of such transaction was to make The Borden Company the obligor of the bonds. The bonds never became those of The Borden Company, but on the contrary were at all times the bonds of Hendler Creamery Company. It occasionally happens that by reason of agreement between them-

selves A pays the taxes on real estate owned by B. In such simple cases the Department has always ruled that the deduction for taxes paid must be taken by B and not by A. This simple analogy is applicable to our case.

In view of the above, it is respectfully submitted that the consolidated net income as determined by the Revenue Agent and shown under Schedule 1 of his report should be reduced with respect to the items of unamortized bond discount and premium on bonds, amounting in all to $56,912.01.

CONCLUSION

In view of the above facts, it is contended that the Agent was in error in disallowing the items commented upon above. In the event that your office is not satisfied with the contentions as outlined in this brief, we would consider it a courtesy if an oral hearing could be granted to enable us to discuss this matter. Due notice of the time and place of such hearing should be sent to the office of the company.

Respectfully,

(Signed) L. MANUEL HENDLER.

Internal Revenue Agent in charge
Baltimore, Maryland

STATE OF MARYLAND }
COUNTY OF BALTIMORE } ss:

L. M. HENDLER, being duly sworn, deposes and says, that he was an officer at date of dissolution, to wit, President of Creameries, Incorporated, the taxpayer named in the foregoing protest; that he has read the protest and the facts stated therein are true to the best of his information and belief.

(Signed) L. MANUEL HENDLER.

Sworn to before me this
8th day of June, 1931.
(Signed) John W. Rogers,
Notary Public.

EXHIBIT "H-1"

Supplemental report of the Internal Revenue Agent in Charge dated November 23, 1931, of the 1929 Income Tax return of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated).

TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
BALTIMORE, MD.

November 23, 1931.

Creameries, Inc.,
1100 E. Baltimore Street,
Baltimore, Maryland.

Dear Sirs:

Please find enclosed copy of supplemental report resulting from further consideration of your tax liability for the year 1929, which is submitted for your information and files.

Kindly acknowledge receipt of this report on the enclosed form.

Yours very truly,
(Signed) E. E. HEARN,
Internal Revenue Agent in Charge.

G
Enc.

TABLE OF CONTENTS

SCHEDULE 1 to 3 inclusive.
Statement of Total Tax Liability.

SUMMARY

PRELIMINARY STATEMENT

Year	Additional Tax
1929	$5,591.76

The principal causes of the additional tax are as follows:
Reduction of Loss Claimed on Obsolete Equipment.
Disallowance of Organization Expenses as a deduction.

Findings have been discussed with Mr. R. M. Dodds, representing the Borden Company and Mr. J. D. Brauner, Assistant Treasurer of the Hendler Creamery Co., who on behalf of the taxpayer now approve the report as submitted herewith and have Form 870 executed to the findings.

CREAMERIES, INC.

SCHEDULE 1.

COMPUTATION OF AMENDED CONSOLIDATED NET TAXABLE INCOME

	January 1 March 31	April 1st June 21st	June 21st December 31st	Total year 1929
THIS REPORT				
Hendler Creamery Co., Inc. (Old)	(72,657.03)	93,663.34	None	21,006.31
Clover Ice Cream Co.	(4,877.74)		None	(4,877.74)
Horn Ice Cream Co., Inc.		31,744.93	None	31,744.93
Supreme Ice Cream Co., Inc.		5,094.36	None	5,094.36
TOTAL	77,534.77	130,502.63	None	52,967.86
ORIGINAL REPORT				
Hendler Creamery Co., Inc. (Old)	(15,744.02)	93,663.34	None	77,913.32
Clover Ice Cream Co.	(4,877.74)		None	(4,877.74)
Horn Ice Cream Co., Inc.		31,744.93	None	31,744.93
Supreme Ice Cream Co., Inc.		5,094.36	None	5,094.36
TOTAL	(20,622.76)	130,502.63	None	109,879.87

Continued

SCHEDULE NO. 2.
NET INCOME

CREAMERIES, INC.

	YEAR ENDED Dec. 31, 1929.	
Net income as disclosed by Original Report		(15,745.02)
As corrected		(72,667.03)
Net adjustment		56,912.01
UNALLOWABLE DEDUCTIONS AND ADDITIONAL INCOME:		
NONTAXABLE INCOME AND ADDITIONAL DEDUCTIONS:	TOTAL	None
(a) Unamortized Discounts	30,342.61	
(b) Premium on Bonds retired	26,569.40	
Net adjustment as above	TOTAL	56,912.01
		56,912.01

SCHEDULE NO. 2-A
Explanation of Items—Changed

(a) Unamortized discount as claimed as a deduction in the return (See Exhibit "F" of Original Report for detail)	40,755.11
Less unamortized discount on bonds exchanged for capital stock. See Item E of Schedule of Original report and Exhibit "F" of the Original report	10,412.50
Balance of unamortized discount on bonds retired for cash and now allowed as a deduction	30,342.61
(b) Premium on bonds retired for cash allowed as a deduction to vendor	26,569.40

CREAMERIES, INC.

SCHEDULE NO. 3

COMPUTATION OF TAX

Year ended Dec. 31, 1929.

Net income for taxable year	$52,967.86
Net loss for 1928	2,133.64
Net Income	$50,834.22
Income Tax 11 percent	5,591.76
TOTAL TAX ASSESSABLE	5,591.76
TAX PREVIOUSLY ASSESSED	NONE
Additional tax to be assessed	5,591.76

STATEMENT OF TOTAL TAX LIABILITY

Year	Deficiency	Correct Tax Liability
1929	$5,591.86	5,591.76

EXHIBIT "I"

Letter of the Commissioner of Internal Revenue dated June 4, 1932, revising the Tax Liability of Creameries, Incorporated for the year 1929, asserting a deficiency in the amount of $58,772.72.

TREASURY DEPARTMENT

WASHINGTON

June 4, 1932.

Creameries, Incorporated,
1100 East Baltimore Street,
Baltimore, Maryland.

Sirs:

You are advised that the determination of your tax liability and that of your affiliated companies for the year 1929 discloses a deficiency of $58,772.72 as shown in the statement which is attached to and made a part of this letter.

In accordance with section 272 of the Revenue Act of 1928 and Article 16 of Regulations 75 relating to consolidated returns of affiliated corporations prescribed under Section 141(b) of the Revenue Act of 1928, notice is here-

by given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability and that of your affiliated companies.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7 The signing of this agreement will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, which ever is earlier; WHEREAS IF NO AGREEMENT IS FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully.

DAVID BURNET,
Commissioner.

By J. C. Wilmer,
Deputy Commissioner.

Enclosures:
Statement
Form 882
Form 870-C-29
Schedule 1 and 2.

IT:AR:C-5
JRK-60D

Returns Examined

	Form	Year
Parent Company:		
Creameries, Incorporated, Baltimore, Maryland	1120	1929
Subsidiary Companies:		
The Clover Ice Cream Company, Baltimore, Maryland	1122	1929
Supreme Ice Cream Company, Baltimore, Maryland	1122	1929
Horn Ice Cream Company, Baltimore, Maryland	1122	1929

Tax Liability

Tax liability of Creameries, Incorporated, and each subsidiary company above named as provided for in Article 15(a) of Regulations 75, prescribed under Section 141(b) of the Revenue Act of 1928.

Year	Tax Liability	Tax Assessed	Deficiency
1929	$64,364.48	$5,591.76	$58,772.72

In accordance with article 16(a) of Regulations 75, the deficiency will be assessed severally against each corporation named above.

The deficiency shown herein is based upon the report dated September 25, 1931 prepared by Revenue Agent Albert Bauer, and transmitted to you under date of November 23, 1931, which report is made a part hereof, and upon such adjustments as are shown in the attached schedules numbered 1 and 2.

In the determination of this deficiency careful consideration was given to the statements made by your representatives in conference at Washington, D. C., on May 23, 1932.

Creameries, Incorporated Year ended December 31, 1929

Schedule 1

Net Income

Net income as disclosed by revenue agent's report, dated September 25, 1931	$52,967.86
As corrected	587,265.26
Net adjustment	$534,297.40
Unallowable deduction and additional income:	
(a) Gain from sale of assets $534,297.40	
Total	$534,297.40

Explanation of Item Changed

(a) Taxable gain recognized in accordance with Section 112 of the Revenue Act of 1928.

Computation

Amount realized from sale of assets in accordance with Section 111 of the Revenue Act of 1928:

Sale price		
Stock of the Borden Company		
105, 306 shares at $80.00		$8,424,480.00
Cash		577,719.27
Total sale price		$9,002,199.27
Net assets sold as shown in the statement attached to return		2,393,485.62
Gain realized from sale		$6,608,712.65
Taxable gain realized:		
Total sale price		$9,002,199.27
Amount distributed to stockholders:		
105, 306 shares Borden Company stock at $80.00	$8,424,480.00	
Cash	43,421.87	8,467,901.87
Taxable gain recognized		$ 534,297.40
Nontaxable gain:		
Gain realized from sale		$6,608,713.65
Gain recognized		534,297.40
Nontaxable gain		$6,074,416.25

Schedule 2

Computation of Tax

Income Tax

Net income for taxable year	$587,265.26
Less:	
Net loss (Section 141, Act of 1928)	2,133.64
Net income	$585,131.62
Balance subject to tax	$585,131.62
Income tax 11%	$ 64,364.48
Total tax assessable	$ 64,364.48
Total previously assessed	5,591.76
Additional tax to be assessed	$ 58,772.72

EXHIBIT "M"

Letter from Commissioner of Internal Revenue to L. Manuel Hendler dated Febraury 3, 1935, advising that the protest filed by L. Manuel Hendler was denied.

TREASURY DEPARTMENT.

Washington.

February 3, 1933.

IT:AR:C-5-311
JRK—60D

Mr. Joseph Addison
806 Mercantile Trust Building
Baltimore, Maryland

Sir:

There is enclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

J. C. WILMER,
Deputy Commissioner,

By (signed) Charles P. Suman,
Chief of Section.

Enclosure:
Copy of letter.

Name and address of taxpayer: Mr. L. Manuel Hendler
913 Lake Drive
Baltimore, Maryland

February 3, 1933.

IT:AS:C-5-311
JRK—60D

Mr. L. Manuel Hendler,
913 Lake Drive,
Baltimore, Maryland.

Sir:

You are advised that the determination of the income tax liability, of Creameries, Incorporated (formerly

Hendler Creamery Company, Incorporated), 1100 East Baltimore Street, Baltimore, Maryland, for the year 1929 discloses a deficiency in tax of $58,772.72, as shown by the attached statement and accompanying schedules, which deficiency plus interest as provided by law, it is proposed to *assets* against you as transferee of said corporation, in accordance with the provisions of section 311 of the Revenue Act of 1928.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

HOWEVER, IF YOU DO NOT DESIRE TO PETITION, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this form will expedite the closing of your return by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed form, or on the date assessment is made, whichever is earlier; WHEREAS IF THIS FORM IS NOT FILED, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,

Commissioner.

By W. T. Sherwood.

Enclosures:
Statement
Form 870
Schedules 1 and 2

LB-3

Mr. L. Manuel Hendler, Transferee
Baltimore, Maryland

STATEMENT

IT:AR:C-5-311
JRK—60D

Returns Examined

Parent Company	Year	Form
Creameries, Incorporated, Transferor, Baltimore, Maryland	1929	1120
Subsidiary Companies		
The Clover Ice Cream Company Baltimore, Maryland	1929	1122
Supreme Ice Cream Company, Baltimore, Maryland	1929	1122
Horn Ice Cream Company, Baltimore, Maryland	1929	1122

Liability for Income Taxes

Mr. L. Manuel Hendler, Transferee,

Baltimore, Md.

Year	Amount
1929	$58,772.72

The records of this office indicate that Creameries, Incorporated, has been dissolved and a proposition of its assets have been transferred to you on or about June 21, 1929.

The above-mentioned amount represents your liability under section 311 of the Revenue Act of 1928 as a transferee of the assets of Creameries, Incorporated, Baltimore, Maryland, for a deficiency of income taxes due from Creameries, Incorporated, for the year 1929.

The deficiency is based upon the report dated September 25, 1931, prepared by Revenue Agent Albert Bauer and transmitted to Creameries, Incorporated, on November 23, 1931, which report is made a part hereof, and upon such adjustments as are shown in the accompanying schedules 1 and 2.

A protest filed by your representative under date of October 27, 1932, in connection with a preliminary notice mailed you on August 29, 1932, was given careful consideration at conferences with your representatives in this office on November 23, 1932, and January 9, 1933.

It is noted that the entire deficiency has been allocated to you as the principal stockholder. This is in accordance with a verbal agreement with your representative at the conference on January 9, 1933 and in lieu of a proration of the deficiency on the basis of stockholdings at the date of liquidation, on or about June 21, 1929, as proposed in the preliminary notice mentioned above.

LB-3

Mr. L. Manuel Hendler, Transferee

Creameries, Incorporated, Transferor

Year ended December 31, 1929.

Schedule 1.

Net Income.

Net income as disclosed by revenue agent's report, dated September 25, 1931	$52,967.86
As corrected	587,265.26
Net adjustment	$534,297.40

Unallowable deduction and additional income:

(a) Gain from sale of assets	$534,297.40	
Total		$534,297.40

Explanation of Item Changed.

(a) Taxable gain recognized in accordance with section 112 of the Revenue Act of 1928.

Computation.

Amount realized from sale of assets in accordance with section 111 of the Revenue Act of 1928:

Sale price:		
Stock of the Borden Company 105,306 shares at $80.00		$8,424,480.00
Cash		577,719.27
Total sale price		$9,002,199.27
Net assets sold as shown in the statement attached to return		2,393,485.62
Gain realized from sale		$6,608,712.65
Total gain recognized:		
Total sale price		$9,002,199.27
Amount distributed to stockholders:		
105,306 shares Borden Company stock at $80.00	$8,424,480.00	
Cash	43,421.87	8,467,901.87
Taxable gain recognized		$534,297.40

RLS-3

Nontaxable gain:	
Gain realized from sale	$6,608,713.65
Gain recognized	534,297.40
Nontaxable gain	6,074,416.25

Schedule 2.

Computation of Tax.

Income Tax.

Net Income for taxable year	$587,263.26
Less:	
Net loss (section 141, Act of 1928)	2,133.64
Net income	$585,131.62
Balance subject to tax	585,131.62
Income tax at 11%	64,364.48
Total tax assessable	64,364.48
Total previously assessed	5,591.76
Additional tax to be assessed	$58,772.72

RIS-3

RECEIPT FOR PAYMENT OF TAXES.

ORIGINAL.

Form 1—Revised Feb. 1926.

Treasury Department.
Internal Revenue Service.

Income
.....
Class of Tax

Collector's Office....,
District of.....
(Description of collection; tax;
at..... Date .....
interest; or offer in compromise;
(Name and Address of Taxpayer) etc.)

L. Manuel Hendler
913 Lake Drive,
Baltimore, Md.

Tax $58,772.72
Interest 10,781.97
(Period covered)
Amount $69,554.69

(Stamped)—
PAID
Apr. 15, 1933

Received payment,

Collector of Internal Revenue.

EXHIBIT "N"

Claim for refund filed by L. Manuel Hendler, filed August 30, 1933.

CLAIM

Form 843
TREASURY DEPARTMENT
Internal Revenue
Service
Revised June 1930

To be filed with the Collector where assessment was made or tax paid

The collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

X Refund of Tax Illegally Collected.
Refund of Amount paid for Stamps Unused, or Used in Error or excess.
Abatement of Tax Assessed (not applicable to estate or income taxes).

State of Maryland
City of Baltimore SS:

Name of Taxpayer or
Purchaser of Stamps L. MANUEL HENDLER, Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.)

Business address 1100 E. Baltimore Street, Baltimore, Md.

Residence 913 Lake Drive, Baltimore, Maryland.

The dependent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Maryland.
2. Period (if for income tax, make separate form for each taxable year) from Janary 1, 1929, to December 31st, 1929.
3. Character of assessment or tax Additional assessment-income tax.

4. Amount of assessment, $58,772.72; dates of payment Apr. 15, '33.

5. ———Interest paid on above assessment $10,781.97.

6. Amount to be refunded $58.772.72. $10,781.97.

7. ———Interest paid $10,781.97. $10,781.97.

8. The time within which this claim may be legally filed expires under Section 322 of the Revenue Act of 1928 on April 15, '35.

The deponent verily believes that this claim should be allowed for the following reasons:

(Attach letter size sheets if space is not sufficient)

Sworn to and subscribed before me this .....day of....., 193

Signed L. MANUEL HENDLER,
Transferee of Creameries, Inc.
(formerly Hendler Creamery Co., Inc.)

.....

Signature of officer administering oath.

SEE INSTRUCTIONS ON REVERSE SIDE

The deponent verily believes that this claim should be allowed for the following reasons:—

(1) The deficiency in tax and interest thereon for which this claim for refund is filed arises out of an alleged liability of the taxpayer, L. Manuel Hendler, under Section 311 of the Revenue Act of 1928, as a transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), 1100 E. Baltimore Street, Baltimore, Maryland, for an alleged deficiency in tax due from Creameries, Incorporated, for the year 1929, as disclosed in a letter from the Commissioner of Internal Revenue addressed to the taxpayer, dated February 3, 1933 (IT:ARC-5-311, JRK-60 D).

(2) The above deficiency assessed against the taxpayer herein and paid by him on April 15, 1933, was based upon the determination and adjustment made therein, contained in a letter from the Commissioner and transmitted to Creameries, Incorporated, dated June 4, 1932 (IT:C:P-7), which said determination and adjustments includes the sum of $534,297.50 as income for the year 1929 of Creameries, Incorporated. The alleged income of Creameries, Incorporated for the year 1929 of $534,297.50 represents the cash equivalent of the bonded indebtedness of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), assumed by The Borden Company under the terms and provisions of a contract of reorganization between said Company and Hendler Creamery Company, Incorporated, and asserted to have been received by Creameries, Incorporated as "other property" in pursuance of a plan of reorganization, resulting in an alleged taxable gain under Section 112 of the Revenue Act of 1928.

(3) The taxpayer as transferee of the assets of Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), denies any liability under Section 311 of the Revenue Act of 1928, arising out of the aforesaid alleged taxable gain recognized in accordance with Section 112 (d), (2) of the Revenue Act of 1928 and asserted to be due by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), because the inclusion in its income for the year 1929 of the cash equivalent of the bonded indebtedness of said corporation was erroneous.

(4) Under the terms and provisions of the aforesaid contract between The Borden Company and Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), which provided for a plan of reorganization, all that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), actually received or was entitled to receive for its assets and for the assumption of its bonded indebtedness by The Borden Company was stock of The Borden Company and cash for the redemption of its prior preference stock, which said cash was distributed in pursuance of the aforesaid plan of reorganization.

All that Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), had to transfer was its net asset value and all it got for that net asset value was stock in The Borden Company and cash which was distributed to Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), stockholders in pursuance of the plan of reorganization.

(5) The transaction was an exchange of property, in pursuance of a plan of reorganization, by a corporation, a party to the reorganization, solely for stock in another corporation a party to the reorganization and for money distributed in pursuance of the plan of reorganization.

It is, therefore, respectfully submitted that the transaction upon which the alleged deficiency is asserted, resulted in no taxable gain under Section 112 (b), (4) and (d), (1) of the Revenue Act of 1928, notwithstanding the assumption of the aforesaid bonded indebtedness and the assessment of the aforesaid tax plus interest thereon against the taxpayer, as transferee, was erroneous and the within claim for refund should be allowed in full.

(6) Otherwise stated the Commissioner is in error in considering the bonded indebtedness assumed by The Borden Company in a reorganization under Section 112 of the Revenue Act of 1928 as "other property" received by Creameries, Incorporated (formerly Hendler Creamery Company, Inc.), and not distributed in pursuance of the plan of reorganization.

(7) A brief containing further detailed reasons in support of and supplementing this claim for refund will be filed subsequently.

EXHIBIT "O"

Tentative notice of disallowance of claim for refund filed by L. Manuel Hendler, dated December 2, 1933.

TREASURY DEPARTMENT
Washington

IT:AR:C
JRK

December 2, 1933.

Mr. Joseph Addison,
806 Mercantile Trust Building,
Baltimore, Maryland.

Sir:

There is enclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

J. C. WILMER,
Deputy Commissioner.
By (Signed) P. H. Sherwood,
Chief of Section.

Enclosure:
Copy of letter

Name and address of taxpayer: Mr. L. Manuel Hendler, 1100 East Baltimore Street, Baltimore, Maryland

IT:AR:C-5
JRK

December 2, 1933.

Mr. L. Manuel Hendler,
1100 East Baltimore Street,
Baltimore, Maryland.

Sir:

Reference is made to your claim for refund, as transferee of Creameries, Incorporated (formerly Hendler Creamery Company), in the amount of $69,554.69 income taxes for the taxable year 1929.

It is noted that your claim is based upon the contention that the income of Creameries, Incorporated for the taxable year 1929 should be decreased by $534,297.50 on the grounds that the contract of reorganization between

Hendler Creamery Company and The Borden Company provided merely for an exchange of stock and resulted in no taxable gain to Hendler Creamery Company.

The records of this office indicate that your contention was discussed with your representative at Washington, D. C., prior to assessment of the tax in question and was disallowed on the basis of facts and data then before the Income Tax Unit.

A comparison of the statements in your claim with the facts and data mentioned above discloses that no new evidence has been presented in support of your contention.

For the foregoing reasons it is proposed to disallow your claim.

Should you desire to present any additional statements of facts, a brief should be executed in triplicate, under oath, and contain, the name and address of the taxpayer; the designation by date and symbols of the letter advising of the proposed disallowance of your claim; the designation of the year involved; an itemized schedule of the findings to which the taxpayer takes exception; a summary of the grounds upon which the taxpayer relies in connection with each exception, setting forth details of facts, figures, and all material evidence available to taxpayer. Your brief should also contain a statement as to whether or not you desire a hearing and should be filed with the Commissioner of Internal Revenue, Washington, D. C.

Careful consideration will be given your brief and you will be advised of the determination of the Income Tax Unit. If your contentions are not conceded and you have requested a hearing, you will be advised relative thereto.

If no response is received within thirty days from the date of this letter, your claim will be disallowed. Official notice will be issued by registered mail in accordance with Section 1103(a) of the Revenue Act of 1932.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.

By (Signed) H. B. Robinson,
Head of Division.

EXHIBIT "P"

Further notice of disallowance of claim for refund filed by L. Manuel Hendler, dated March 26, 1934.

TREASURY DEPARTMENT
Washington

IT:AR:C-5
JRK

March 26, 1934.

Mr. William R. Semans,
Mercantile Trust Building,
Baltimore, Maryland.

Sir:

There is inclosed a carbon copy of a letter of this date addressed to the taxpayer whose name and address are given below. This copy is furnished in accordance with the authority conferred upon you by the taxpayer to whom the original letter has been mailed.

Respectfully,

CHAS. T. RUSSELL,
Deputy Commissioner.
By P. H. Sherwood,
Chief of Section.

Enclosure:
Copy of letter:

Name and address of taxpayer — **L. Manuel Hendler, Transferee of Creameries, Inc., Baltimore, Maryland.**
Year 1929.

March 26, 1934.

IT:AR:C-5
JRK

Mr. L. Manuel Hendler,
1100 East Baltimore Street,
Baltimore, Maryland.

Sir:

Reference is made to your claim for refund, as transferee of Creameries, Incorporated (formerly Hendler

Creamery Company), in the amount of $69,554.69, income taxes for the taxable year 1929.

Your claim is based upon the contention that the taxable net income of Creameries, Incorporated, for the calendar year 1929 should be decreased by $534,297.50 on the ground that the contract of reorganization between Hendler Creamery Company and The Borden Company provided merely for an exchange of stock and resulted in no taxable gain to Hendler Creamery Company.

The Bureau holds that there was constructive receipt of $534,297.40 in cash, in addition to the stock received, and that the taxpayer is liable for a taxable gain on the disposition of its assets to the extent of the cash received, in accordance with Section 112(d)(2) of the Revenue Act of 1928.

For the foregoing reasons, your claim will be disallowed. Official notice of the disallowance of your claim will be issued by registered mail in accordance with Section 1103 (a) of the Revenue Act of 1932.

Respectfully,

CHARLES T. RUSSELL,

Deputy Commissioner.

By (Signed) H. B. Robinson.

Head of Division.

EXHIBIT "R"

Certified copies of tentative and final income tax returns of Creameries, Incorporated (formerly Hendler Creamery Company, Incorporated), for calendar year 1929, filed March 6th, 1930 and June 6, 1930, respectively.

CREAMERIES, INC.

(Formerly Hendler Creamery Co., Inc.)

Summary of Prorated Net Income Transferred from Returns of Hendler Creamery Co., Inc., Supreme Ice Cream Co., Inc., and Horn Ice Cream Co. Inc., included in the return of The Borden Company, and subsidiaries; shown in Item 10 (a) page 1 of Return.

Hendler Creamery Company, Inc.,	$ 78,403.31
Supreme Ice Cream Company, Inc.	3,889.88
Horn Ice Cream Company, Inc.	27,031.88
Total	$109,325.07

CREAMERIES, INC.

(Formerly Hendler Creamery Co., Inc.)

Statement Regarding Transfer of Net Assets in Reorganization and Dissolution of Company.

The net assets of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and its subsidiaries, namely, Supreme Ice Cream Company, and the Horn Ice Cream Company and its subsidiary, the Clover Ice Cream Company, pursuant to a plan of reorganization from which no taxable gain or deductible loss results to the company as set forth in Section 112 of the Revenue Act of 1928, were exchanged for 86,716 shares of common stock of The Borden Company, 350 Madison Avenue, New York, New York, and such shares of common stock were issued to the stockholders as a distribution in liquidation of this company.

The effective date of acquisition by The Borden Company of the assets of these companies, was April 1, 1929, but, the actual closing title date of such acquisition was June 21, 1929.

New companies, known as Hendler Creamery Company, Inc., Supreme Ice Cream Company, Inc., and Horn Ice Cream Company, Inc., were organized by The Borden Company to take over the assets of the old companies mentioned above, and by bookkeeping entries the net income of the old companies from the effective date of acquisition to the actual date of closing title was transferred to the books of the new companies.

It is recognized, however, due to Regulations and Decisions governing the reporting of taxable net income of a vendor corporation, the taxable net income to be reported by these corporations should include the operating net income up to the actual date of closing title. Therefore, the net operating income between the effective date of acquisition, April 1, 1929, and the actual closing title date, June 21, 1929 (prorated on the basis of the number of days between the effective date and actual closing title date, as they bear to the entire period of operating net income, as shown by the books of the new companies), has been included in item 10 (a) on page 1 of return. Schedules covering the new companies showing how this proration of income is arrived at are appended hereto.

The transfer of net assets in reorganization on April 1, 1929, follows:

Assets:	
Cash	$202,062.24
Notes Receivable	33,635.46
Accounts Receivable	104,662.16
Inventories	95,992.76
Investments	40,350.00
Deferred and Suspended Assets	40,876.68
Capital Assets, less Depreciation Reserve	2,219,747.49
Other Assets	8,096.37
Goodwill	867,503.72
	$3,612,926.88

Less Liabilities:		
Notes Payable	$1,050,000.00	
Accounts Payable	130,410.78	
Accrued Expenses	39,030.48	1,219,441.26
		$2,393,485.62
Less:		
Redemption of Bonds	$668,000.00	
Retirement of 1st Preferred 7% Stock	1,250,100.00	1,918,100.00
Net Assets transferred to The Borden Company in exchange for 86,716 shares of Common Stock		$475,385.62

The 86,716 shares of common stock of The Borden Company were issued to the stockholders as a distribution in liquidation of this company. The net worth of this company at the time of distribution follows:

Capital Stock:		
Preferred Stock		$ 20,000.00
Common Stock		30,000.00
Surplus		493,608.09
		$543,608.09
Less:		
Unamortized Discount and Expense on Bond issue	$40,755.11	
Organization expense of Supreme Ice Cream Company, company now in process of dissolution	27,467.36	68,222.47
Net Worth		$475,385.62
Net Worth, April 1, 1929		$475,385.62
Plus:		
Income reported in item 10 (a) page 1 of return		109,352.07

Distribution in liquidation:

Preferred Stock	$20,000.00	
Common Stock	30,000.00	
Amount as shown in item 16 (c) page 3 of return	534,710.69	$584,710.69

Creameries, Inc. (formerly Hendler Creamery Company, Inc.) and its subsidiaries, are in process of dissolution. A list of stockholders showing the number of shares of stock held by each in Creameries, Inc., and the number of shares of stock of The Borden Company distributed to each is attached hereto.

CREAMERIES, INC.

(*Formerly Hendler Creamery Co., Inc.*)

Name and Address	Number of Shares held in Creameries, Inc. (formerly Hendler Creamery Co., Inc.)		Number of shares of The Borden Company distributed in liquidation
	Common	Preferred	Common
L. Manuel Hendler, 1710 Eutaw Place,	24,650	16,667	71,656
Nathan Lebovitz 813 Lake Drive	1,250	833	3,612
Mrs. Rose Hendler 1710 Eutaw Place	1,500	1,000	4,335
Louis Hendler 26th & Market Streets Wilmington, Delaware	250	167	723
Michael Hendler 26th & Market Streets Wilmington, Delaware	500	333	1,444
B. R. Hendler 2523 Reisterstown Rd. Baltimore, Maryland	1,025	683	2,962
Harry Hendler 2523 Reisterstown Rd. Baltimore, Maryland	250	167	723

Irvin D. Baxter 2452 Eutaw Place	100	—	174
Adam Deupert 3612 St. Paul Street	200	—	347
C. C. Croggon 1127 Calvert Bldg.	50	—	87
Harry C. Cover 702 Brookwood Road	50	33	144
Harry A. Duke 3915 Boarman Avenue	50	33	144
John D. Brawner 3510 Edgewood Road	37	25	108
J. Arley Robison 2401 Oswego Avenue	25	17	73
Harry K. Bosch 1714 N. Appleton Street	25	17	73
Harry B. Siegmund 4109 Chatham Road	12	8	35
Daniel P. Banks, Jr. 1721 N. Calvert Street	13	9	39
John W. Rogers 2823 Baker Street	13	8	37
	30,000	20,000	86,716

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CORPORATION INCOME TAX RETURN
For Calendar Year 1929

File This Return with the Collector of Internal Revenue for Your District on or Before March 15, 1930

Page 1 of Return.

No. 80

Serial Number #55926

PRINT PLAINLY CORPORATION'S NAME AND BUSINESS ADDRESS

CREAMERIES, INC. (FORMERLY HENDLER CREAMERY COMPANY, INC.)
(Name)

1100 East Baltimore Street.
(Street and number)

Baltimore, Maryland.
(Post office and State)

Date of Incorporation: August 10, 1926.

Under the Laws of what State or Country: Maryland

Kind of Business: Ice Cream Manufacturing

Is This a Consolidated Return of Two or More Corporations? Yes

LETTER DATED

POSTED

GROSS INCOME

Item			
1. Gross Sales from Trading or Manufacturing, Less Returns and Allowances		$ 326,405.60	
2. Cost of Goods Sold: (a) Inventory at beginning of year	$ 52,722.48		
(b) Merchandise bought for sale	145,023.53		
(c) Cost of manufacturing or producing goods (From Schedule A)	35,159.52		
(d) Total of lines (a), (b), and (c)	$ 232,905.53		
(e) Less inventory at end of year	47,733.80	185,171.73	
3. Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)		$ 141,233.87	
4. Gross Income from Operations Other Than Trading or Manufacturing: (a)			
(b)			
(c)			
5. Interest on Bank Deposits, Notes, Mortgages, and Corporation Bonds		8,444.26	
6. Rents		243.62	
7. Royalties			
8. Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (From Schedule B) LOSS		35.66	
9. Dividends on Stock of Domestic Corporations		324.99	
10. Other Income (including dividends received on stock of foreign corporations): Prorata of net income transferred from returns of Hendler Creamery Company, Inc. Supreme Ice Cream Co. Inc., and Horn Ice Cream Co. Inc.		109,325.07	
Cash Discounts $1,781.92 - Equipment rentals $900.00		2,681.92	
11. Total Income in Items 3 to 10			$ 262,217.67

DEDUCTIONS

Item		
12. Compensation of Officers (From Schedule C)	$ 18,899.95	
13. Rent on Business Property	136.95	
14. Repairs (From Schedule D)		
15. Interest	81,212.85	
16. Taxes (From Schedule E)	4,298.22	
17. Losses (From Schedule F)		
18. Bad Debts (From Schedule G)	407.60	
19. Dividends (From Schedule H)	324.99	
20. Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (From Schedule I)	18,507.74	
21. Depletion of Mines, Oil and Gas Wells, Timber, etc.		
22. Other Deductions Not Reported Above: (a) Salaries and wages		
(b) Net Loss for prior year. (Submit schedule)		
(c) Schedule attached	142,048.17	
(d)		
(e)		
(f)		
23. Total Deductions in Items 12 to 22		$ 265,836.47
24. Net Income (Item 11 minus Item 23) LOSS		$ 3,618.[illegible]

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NOV 1931

COMPUTATION OF TAX

25. Net Income (Item 24 above) LOSS	$ 3,618.80	28. Income Tax (12% of Item 27)	$ -
26. Less Credit of $3,000 (for a domestic corporation having a net income of less than $25,000)		29. If net income of domestic corporation is less than $25,000, enter the amount over $25,000	
27. Balance (Item 25 minus Item 26)	$ -	30. Total Tax (Item 28 plus Item 29)	$
31. Less: Income Tax Paid at Source. (This credit can only be allowed to a nonresident foreign corporation)	$		
32. Income Tax Paid to a Foreign Country or U. S. possession by a domestic corporation (see Inst. 27)			
33. Balance of Tax (Item 30 minus Items 31 and 32)			$ -

An amended return must be marked "Amended" at top of return. Checks and drafts will be accepted only if payable at par.

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1. Net income from Item 31, page 1 of the return LOSS	3,618.60
2. Nontaxable income:	
(a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia	
(b) Interest on securities issued under the Federal Farm Loan Act, or under such Act as amended	
(c) Interest on obligations of the United States or its possessions	
(d) Dividends deductible under Section [illegible] of the Revenue Act of [illegible]	324.99
(e) Proceeds of life insurance policies paid upon the death of the insured	
(f) Other items of nontaxable income (to be detailed):	
(1) Refund of Federal Tax	
(2) Year 1922	868.23
(3)	
3. Charges against reserve for bad debts, if Item [illegible], page 1 of return, is not an addition to a reserve	
4. Charges against reserves for contingencies, etc. (to be detailed):	
(a)	
(b)	
(c)	
5. Total of Lines 1 to 4, inclusive	2,425.38
6. Total from Line 14	2,020.12
7. Net profit for year, as shown by books, before any adjustments [illegible] made thereto (Line 5 minus Line [illegible])	4,445.50
8. Surplus and undivided profits as shown by balance sheet at close of preceding taxable year Hand.Cr.Co.Inc.	363,457.46
Clover I.C. Co.	2,838.33
9. Other credits to surplus (to be detailed):	
(a) Surplus from app. of prop.	21,256.02
(b) Surplus-Supreme I.C.Co. as	
(c) of March 31, 1929	45,083.46
(d) Reversion of Surplus re- Served to Sur. [illegible] at 3/31/29	124,845.11
10. Total of Lines 7 to 9, inclusive	553,034.89
11. Total from Line 17	553,034.89
12. Surplus and undivided profits as shown by balance sheet at close of taxable year (Line 10 minus Line 11)	- 0 -

13. Nondeductible deductions:	
(a) Donations, gratuities, and contributions	
(b) Income and profits taxes paid to the United States, and so much of such taxes paid to its possessions or foreign countries as are claimed as a credit in Item [illegible], page 1 of the return	
(c) Federal taxes paid on tax-free covenant bonds	
(d) Special improvement taxes tending to increase the value of the property assessed	
(e) Furniture and fixtures, additions, or betterments treated as expense on the books	
(f) Replacements and renewals	
(g) Insurance premiums paid on the life of any officer or employee where the corporation is directly or indirectly a beneficiary	
(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation	
(i) Additions to reserve for bad debts which are not included in Item [illegible], page 1 of return	
(j) Additions to reserves for contingencies, etc. (to be detailed):	
(1)	
(2)	
(3)	
(k) Other unallowable deductions (to be detailed):	
(1) Excess depreciation on	
(2) appraisal over-cost	
(3) values	2,020.12
14. Total of Line 13	2,020.12
15. Dividends paid during the taxable year (state whether paid in cash, stock of the corporation, or other property):	
(a) Date paid 3-31-29 Character Cash	17,937.50
(b) Date paid Character	
(c) Date paid Character	
(d) Date paid Character	
16. Other debits to surplus (to be detailed):	
(a) To adjust-Clover I.C.1-1-29	386.70
(b) Distribution in liquidation	
(c) per statement attached	534,710.69
17. Total of Lines 15 and 16	553,034.89

QUESTIONS

KIND OF BUSINESS

1. By means of the key letters given below, identify the corporation's main income-producing activity with one of the general classes, and follow this by a special description of the business sufficient to give the information called for under each general class.

A.—Agriculture and related industries, including fishing, logging, ice harvesting, etc., and also the leasing of such property. State the product or products. B.—Mining and quarrying, including gas and oil wells, and also the leasing of such property. State the product or products. C.—Manufacturing. State the product and also the material if not implied by the name of the product. D.—Construction—excavations, buildings, bridges, railroads, ships, etc., also equipping and installing same with systems, devices, or machinery, without their manufacture. State nature of structures built, materials used, or kind of installations. E1.—Transportation—rail, water, local, etc. State the kind and special product transported, if any. E2.—Public utilities—gas (natural, coal, or water); electric light or power (hydro or steam generated); heating (steam or hot water); telephone; waterworks or power. E3.—Storage—without trading or profit from sales—(elevators, warehouses, stockyards, etc.). State product stored. E4.—Leasing transportation or utilities. State kind of property. F.—Trading in goods bought and not produced by the trading concern. State manner of trade, whether wholesale, retail, or commission, and product handled. Sales with storage with profit primarily from sales. G.—Service—domestic, including hotels, restaurants, etc.; amusements; other professional, personal, or technical service. State the service. H.—Finance, including banking, real estate, insurance. I.—Concerns not falling in above classes (a) because of combining several of them with no predominant business, or (b) for other reasons.

2. Concerns whose business involves activity falling in two or more of the above general classes, where the *same product* is concerned, should report business as identified with but one of the above general classes; for example, concerns in A or B which also transport and market their own product exclusively or mainly, should still be identified with classes A or B; concerns in C (manufacturing) which own or control their source of material supply in A or B and which also transport, sell, or install their own product exclusively or mainly, should be identified with manufacturing; concerns in D may control or own the source of supply of materials used exclusively or mainly in their constructive work; concerns in E1 or E2 may own or control the source of their material or power; concerns in F may transport or store their own merchandise, but its production would identify them with A, B, or C.

3. Answers:

(a) General class (use key letter designation) C

(b) Main income-producing business (give specifically the information called for under each key letter, also whether acting as principal, or as agent on commission; state if inactive or in liquidation)

In liquidation.

AFFILIATIONS WITH OTHER CORPORATIONS

SEE INSTRUCTION 30

4. Is this a consolidated return of two or more corporations? Yes If so, procure from the Collector of Internal Revenue for your district Form 851, Affiliations Schedule, which shall be filled in, sworn to, and filed as a part of this return. See Article 12 (c) and (d), Regulations 75.

5. Did the corporation file a consolidated return for the preceding taxable year? No

6. Did the [illegible] file a return under the same name for the preceding taxable year? No Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this or any prior year since December 31, 1917? ________ If answer is "yes," give name and address of each predecessor business, and the date of the change in entity. Name of Corporation changed to Creameries, Inc., from Handler Creamery Co. Inc., June 25, 1929.

Upon such change were any asset values increased or decreased? No If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

7. Is this return made on the basis of actual receipts and disbursements? No If not, describe fully what other basis or method was used in computing net income. Accrual method

VALUATION OF INVENTORIES

8. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock.

LIST OF ATTACHED SCHEDULES

9. Enter below a list of all schedules accompanying this return, giving for each a brief title and the schedule number. The name and address of the corporation should be placed on each separate schedule accompanying the return.

PER INDEX ATTACHED

The corporation's books are in care of Corpora[illegible]
Lo[illegible] 100 East [illegible] St. [illegible]

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Page 4 of Return

SCHEDULE A—COST OF MANUFACTURING OR PRODUCING GOODS (See Instruction 3)

Items	Amount	Items	Amount
Salaries and wages	$16,985.97		$
Material and supplies	3,117.41		
Maintenance	2,763.11		
Water	180.75		
Insurance	5,487.82		
Light and Power	6,549.77		
Miscellaneous	74.69	TOTAL	35,159.52

SCHEDULE B—PROFIT FROM SALE OF REAL ESTATE, STOCKS, BONDS, ETC. (See Instruction 8)

1. Kind of Property	2. Date Acquired	3. Amount Received	4. Depreciation Allowable Since Acquisition	5. Cost or Value as of March 1, 1913, Whichever Greater	6. Subsequent Improvements	7. Net Gain (Enter as Item 8)
Mechanical Cabinets	Various	$ 206.00	$ 83.89	$ 325.75	$	$ 35.86
Edison Battery		-	1710.00	1,710.00		-

State how property was acquired

SCHEDULE C—COMPENSATION OF OFFICERS (See Instruction 12)

1. Name of Officer	2. Official Title	3. Time Devoted to Business	4. Shares of Stock Owned: Common	5. Shares of Stock Owned: Preferred	6. Amount of Compensation (Enter as Item 12)
L. M. Hendler	President	All			12,749.97
B. R. Hendler	Vice-Pres.	"			782.00
N. Lebovitz	Treasurer	"			2,752.00
J. D. Brawner	Asst. Treas.	"			[illegible]
[redacted]	Director				400.00
[redacted]	"				[redacted]
[redacted] Ice Cream Co.)	President	All			[redacted]

SCHEDULE D—COST OF REPAIRS (See Instruction 14)

1. Items	2. Amount (Enter as Item 14)
Salaries and wages	$
Included in Schedule "A"	

SCHEDULE E—TAXES PAID (See Instruction 16)

1. Items	2. Amount (Enter as Item 16)
Vehicle Licenses	$ [illegible]
Stock Transfer Stamps	870.00
Real Estate and Personal Property	5,291.[illegible]

SCHEDULE F—EXPLANATION OF LOSSES BY FIRE, STORM, ETC. (See Instruction 17)

1. Kind of Property	2. Date Acquired	3. Cost or Value as of March 1, 1913, Whichever Greater	4. Subsequent Improvements	5. Depreciation Allowable Since Acquisition	6. Insurance and Salvage Value	7. Deductible Loss
		$	$	$	$	$

State how property was acquired

SCHEDULE G—BAD DEBTS (See Instruction 18)

1. Year	2. Sales on Account	3. Bad Debts
1925	$	$
1926		
1927		
1928		
1929		407.60

SCHEDULE H—DIVIDENDS DEDUCTIBLE (See Instruction 19)

1. Name of Corporation	2. Amount of Dividends: Domestic	3. Amount of Dividends: Foreign
Kraft Phenix Cheese Corp.	$ 324.00	$

SCHEDULE I—EXPLANATION OF DEDUCTION FOR DEPRECIATION (See Instruction 20)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Age When Acquired	4. Probable Life After Acquirement	5. Cost or Value as of March 1, 1913, Whichever Greater (Exclusive of Land)	6. Amount of Depreciation Charged Off: Previous years	7. Amount of Depreciation Charged Off: This year
				$	$	$
		SCHEDULE ATTACHED				

AFFIDAVIT

We, the undersigned, president and treasurer of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return, including the accompanying schedules and statements, has been examined by him and is, to the best of his knowledge and belief, a true and complete return made in good faith, for the taxable year stated, pursuant to the Revenue Act of 1928 and the Regulations issued thereunder.

Sworn to and subscribed before me this 3rd day of June, 1930.

NOTARIAL SEAL

John W. Rogers (Signature of officer administering oath) Notary Public (Title)

CORPORATE SEAL

[signature], President

J. D. Brawner, Ass't. Treasurer

Attach a separate sheet if any of the above schedules require more than the sufficient space

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CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.) AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS, JANUARY 1, 1929 AND APRIL 1, 1929

	JANUARY 1, 1929				APRIL 1, 1929							
ASSETS	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.)	CLOVER ICE CREAM COMPANY	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.)	SUPREME ICE CREAM COMPANY	TOTAL HORN ICE CREAM COMPANY	ELIMINATION	CLOVER ICE CREAM COMPANY	HORN ICE CREAM COMPANY
Cash	$ 349,301.42	$	$ 343,665.68	$ 5,635.74	$ 308,068.84	$	$ 218,104.38	$ [illegible]	$ 16,444.54	$	$ 3,505.76	$ 19,950.32
Notes Receivable	26,994.23		26,994.23	440.00	[illegible]		31,433.29	1,[illegible].17	740.00		740.00	
Accounts Receivable	62,762.87		36,217.71	26,545.16	106,197.44		49,354.70	16,[illegible].64	40,554.10		13,212.12	27,341.98
Less: Reserve for Bad Debts	1,232.87		1,232.87		[illegible]		1,535.28					
	61,530.00		34,984.84	26,545.16	104,662.16		47,819.42	16,[illegible].64	40,554.10		13,212.12	27,341.98
Inventories:												
Raw Materials and Supplies	41,834.81		35,489.22	6,345.59	77,874.61		27,562.59	2,916.96	47,395.06		3,436.21	43,958.85
Finished Goods	10,888.67		10,888.67		18,118.15		12,969.35	4,[illegible].90	[illegible]		[illegible].90	
	52,723.48		46,377.89	6,345.59	95,992.76		40,531.94	7,[illegible].86	48,[illegible]		4,300.11	43,958.85
Investments:												
Stocks of Domestic Corporations	36,650.00	302,216.67	338,866.67		50,350.00	1,055,000.00	1,065,350.00			302,216.67		302,216.67
Bonds of Domestic Corporations	9,875.00		9,875.00		10,000.00		10,000.00					
Obligations of the United States												
Other investments						856,500.00	856,500.00					
	46,525.00	302,216.67	348,741.67		40,350.00	1,891,500.00	1,931,850.00			302,216.67		302,216.67
Deferred Charges:												
Prepaid Insurance	12,447.15		10,220.59	2,226.26	10,669.08		6,964.05	2,4[illegible].02	1,228.03		1,228.03	
Prepaid Taxes	1,600.82		1,309.86	290.96	6,202.38		2,401.60	[illegible].61	3,583.12		264.10	3,319.02
Other	5,420.32		5,420.32		[illegible]		25,790.27	1[illegible].00				
	19,468.29		16,951.07	2,517.22	40,[illegible]		35,246.90	[illegible]	4,811.15		1,492.13	3,319.02
Capital Assets:												
Land	100,900.00		100,900.00		144,222.80		100,900.00	8,[illegible].00	35,022.80			35,022.80
Buildings	547,760.56		547,760.56		970,397.79		548,151.57	50,[illegible].81	371,348.41			371,348.41
Machinery and Equipment	728,643.06		683,098.52	45,544.54	757,434.62		363,219.14	72,7[illegible].47	321,432.01		40,984.23	280,447.78
Mechanical Refrigerators	93,601.16			93,601.16	[illegible]		242,106.60	77,[illegible].26	213,305.00		85,340.00	127,965.00
Furniture and Fixtures	28,316.84		28,316.84		21,001.15		15,114.00		5,886.65			5,886.65
Delivery Equipment	275,403.23		266,801.25	8,601.98	330,126.25		266,801.25	67,[illegible].00	195,460.00		75,630.00	119,830.00
Boxes, Cans, Tubs, etc.					196,145.86		105,367.31	2,[illegible].50	61,[illegible]		17,187.85	44,151.00
	1,774,624.85		1,626,877.17	147,747.68	3,032,896.08		1,641,660.57	2[illegible],7[illegible].04	1,134,101.48		232,341.78	901,949.04
Less: Reserve for Depreciation	508,895.99		434,729.26	74,166.73	[illegible]		450,452.33	[illegible].79	283,567.31		97,330.61	205,186.89
	1,265,728.86		1,192,147.91	73,580.95	2,219,747.40		1,191,208.24	196,0[illegible].24	850,533.91		134,611.17	693,762.74
Other Assets:												
Surrender Value of Life Insurance	8,096.37		8,096.37		8,096.37		8,096.37					
Organization Expense					27,467.36			27,4[illegible].36				
Bond Discount and Expense	51,986.80		51,986.80		40,756.11		40,756.11					
Goodwill	[illegible]	2,216.67		[illegible]	[illegible]	854,000.00		17,[illegible]	[illegible]	1,216.67	[illegible]	[illegible]
	[illegible]	1,216.67	60,0[illegible].17	[illegible]	[illegible]	854,000.00	[illegible]	[illegible]	[illegible]	1,216.67	[illegible]	[illegible]
TOTAL ASSETS	$2,310,107.61	$300,000.00	$2,291,708.86	$318,401.86	$3,981,148.88	$1,657,000.00	$5,543,084.65	$271,084.43	$1,324,480.87	$300,000.00	$381,807.[illegible]	$1,502,[illegible].41

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CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.) AND SUBSIDIARIES

CONSOLIDATED BALANCE SHEETS, JANUARY 1, 1929 AND APRIL 1, 1929

	JANUARY 1, 1929				APRIL 1, 1929							
LIABILITIES	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.)	CLOVER ICE CREAM COMPANY.	TOTAL	ELIMINATION	CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO. INC.)	SUPREME ICE CREAM COMPANY	TOTAL HORN ICE CREAM COMPANY	ELIMINATION	CLOVER ICE CREAM COMPANY.	HORN ICE CREAM COMPANY
Notes Payable	$	$	$	$	$1,050,000.00	$ 550,500.00	$1,050,000.00	$606,500.00	$ 650,000.00	$	$	$ 650,000.00
Accounts Payable	105,506.75		88,664.92	14,841.83	130,410.76		109,005.91	17,383.94	4,021.88		618.10	3,405.78
Mortgages Payable	675,000.00		675,000.00		668,000.00		668,000.00					
Accrued Expenses:												
Interest					13,728.00		13,728.00					
Taxes					19,726.41		18,641.44	1,078.97				
Other	3,318.65		2,597.26	721.39	5,564.07		5,148.17	100.97	314.93		188.23	126.68
	3,318.65		2,597.26	721.39	39,030.48		37,537.61	1,177.94	314.93		188.23	126.68
Other Liabilities:												
Reserve for Contingencies	35,000.00		35,000.00									
Reserve for Bond Discount, etc.	51,986.60		51,986.60									
	86,986.60		86,986.60									
Capital Stock:												
Preferred Stock	1,045,000.00		1,045,000.00		1,270,100.00		1,270,100.00					
Common Stock	30,000.00	300,000.00	30,000.00	300,000.00	30,000.00	501,000.00	30,000.00	1,000.00	500,000.00	300,000.00	300,000.00	500,000.00
	1,075,000.00	300,000.00	1,075,000.00	300,000.00	1,300,100.00	501,000.00	1,300,100.00	1,000.00	500,000.00	300,000.00	300,000.00	500,000.00
Surplus	366,295.81		365,457.48	2,838.33	493,606.09	300,000.00	378,371.13	45,065.45	370,153.51		21,063.51	349,090.00
TOTAL LIABILITIES	$2,310,107.81	$300,000.00	$2,291,706.26	$318,401.55	$3,681,149.35	$1,657,500.00	$3,543,064.65	$271,094.45	$1,524,490.37	$300,000.00	$321,807.86	$1,502,682.41

- Balance Sheet, April 1, 1929 immediately prior to transfer of Net Assets in reorganization.

EXHIBIT "S"

Minutes of special meeting of Board of Directors of Hendler Creamery Company, Incorporated, held June 17, 1929.

HENDLER CREAMERY CO., INC.

HENDLER CREAMERY COMPANY, INCORPORATED

MINUTES OF A SPECIAL MEETING OF THE BOARD OF DIRECTORS

A special meeting of the Board of Directors of Hendler Creamery Company, Incorporated, was held at the offices of the company, 1100 East Baltimore Street, Baltimore, Maryland, on the 17th day of June, 1929, at two o'clock in the noon, pursuant to waiver.

The following directors were present:

Messrs. L. M. Hendler, B. R. Hendler, Cover, Brawner and Lebovitz, constituting a quorum.

The president of the company, Mr. L. Manuel Hendler, presided, and Mr. Nathan Lebovitz, the secretary of the company, acted as secretary of the meeting.

The president advised the board that the contract between this company and the Borden Company authorized at meetings of the directors and stockholders held on May 21, 1929, had been executed and delivered, and that it was expected that the transaction would be closed on June 21, 1929. That under the terms of the contract, this company was entitled to eighty-six thousand seven hundred and sixteen (86,716) shares of stock of the Borden Company, and that by resolutions adopted by this board and by the stockholders at the meetings held on May 21, 1929, this company was to be liquidated and the preferred and common stock under said resolutions was to be treated as equal, share per share. He further advised that the Borden Company had agreed to assume all liabilities of this company except those certain liabilities mentioned in the contract with which this board is familiar.

The secretary then presented to the meeting a list of the preferred and common stockholders of the company as of this date, showing their respective holdings of stock as follows:

Stockholders	Preferred	Common
L. Manuel Hendler	16,667	24,650
Nathan Lebovitz	833	1,250
Mrs. Rose Hendler	1,000	1,500
Louis Hendler	167	250
Michael Hendler	333	500
B. R. Hendler	683	1,025
Harry Hendler	167	250
Harry C. Cover	33	50
Harry A. Duke	33	50
John D. Brawner	25	37
J. Arley Robison	17	25
Harry K. Bosch	17	25
Harry B. Siegmund	8	12
Daniel F. Banks, Jr.	9	13
John W. Rogers	8	13

Irvin D. Baxter, 100 shares common; Adam Deupert, 200 shares common; C. C. Croggon, 50 shares common.

The secretary further reported that the holders of the preferred and common stock had all deposited their stock with him, to be held by the company and to assure the payment of the liquidation dividend to those entitled thereto. The secretary further reported that it was found that upon liquidation and equal distribution each share of the preferred and common stock of this company would be entitled to 1.73432 shares of The Borden Company stock, and that it was impossible to have the Borden Company stock issued in fractional shares the stockholders had agreed among themselves on a distribution in the nearest number of whole shares, and the secretary filed with the meeting an agreement signed by all of the stockholders setting forth the agreed distribution of the Borden Company stock.

Thereupon on motion duly made and seconded it was unanimously

RESOLVED that the company be liquidated by distributing to the stockholders of record as of this date the eighty-six thousand seven hundred and sixteen (86,716) shares of the Borden Company stock to which this company is entitled under the contract with The Borden Company, and that in accordance with the agreement of the stockholders the distribution shall be as follows:

NAME OF STOCKHOLDER	PREFERRED STOCK	COMMON STOCK	BORDEN STOCK
L. Manuel Hendler	16,667	24,650	71,656
Nathan Lebovitz	833	1,250	3,612
Mrs. Rose Hendler	1,000	1,500	4,335
Louis Hendler	167	250	723
Michael Hendler	333	500	1,444
B. R. Hendler	683	1,025	2,962
Harry Hendler	167	250	723
Irvin D. Baxter	....	100	174
Adam Deupert	....	200	347
C. C. Croggon	....	50	87
Harry C. Cover	33	50	144
Harry A. Duke	33	50	144
John D. Brawner	25	37	108
J. Arley Robison	17	25	73
Harry K. Bosch	17	25	73
Harry B. Siegmund	8	12	35
Daniel F. Banks, Jr.	9	13	39
John W. Rogers	8	13	37
	20,000	30,000	86,716

Thereupon motion duly made and seconded the following resolution was unanimously adopted—

RESOLVED that the above named stockholders of this company shall agree prior to the time of receiving The Borden Company stock that they will in the proportion that the Borden Stock received by them bears to the total of eighty-six thousand, seven hundred and sixteen (86,716) shares of Borden stock assume and pay when legally due and demandable all of the liabilities of this company not assumed and paid by The Borden Company.

Upon motion duly made and seconded, a salary of five hundred dollars was declared payable to each director for services from January 1 to June 20, 1929.

There being no further business before the meeting, the meeting was adjourned.

NATHAN LEBOVITZ,
Secretary.

EXHIBIT "T"

Consent waiver, Form No. 870, executed by Creameries, incorporated, agreeing to immediate assessment of Deficiency Tax for calendar year, 1929.

Form 870

Treasury Department
Internal Revenue Service
Revised February, 1931

WAIVER OF RESTRICTIONS ON ASSESSMENT AND COLLECTION OF DEFICIENCY IN TAX.

Pursuant to the provisions of Section 274(d) of the Revenue Act of 1926, and/or Section 272(d) of the Revenue Act of 1928, the undersigned taxpayer waives the restrictions provided in Section 274(a) of the Revenue Act of 1926, and/or Section 272(a) of the Revenue Act of 1928, and consents to the assessment and collection of a deficiency in income tax for

The calendar year ended December 31, 1929 in the sum of $5,591.76 together with interest thereon as provided by law.

(SEAL)

CREAMERIES, INCORPORATED
(formerly Hendler Creamery Company, Inc.)
Name
1100 block East Baltimore Street,
Baltimore, Maryland
Address
By L. Manuel Hendler,
President at date of dissolution.

Date September 29, 1931.

Note: This waiver does not extend the statute of limitations for refund or assessment of tax, and is not an agreement as provided under Section 606 of the Revenue Act of 1928, but its execution and filing at the address shown in the accompanying letter will expedite the adjustment of your income tax liability as indicated above.

Where the taxpayer is a corporation, the waiver shall be signed with the corporate name, followed by the signature and title of such officer or officers of the corporation as are empowered to sign for the corporation, in addition to which the seal, if any, of the corporation must be affixed.

EXHIBIT "U"

Agreement between the Borden Company and L. Manuel Hendler and Nathan Lebovitz, dated April 16, 1929.

April 16th, 1929.

Messrs. L. Manuel Hendler
and
Nathan Lebovitz

Dear Sirs:

We hereby make you the following offer:

1. It is our understanding and you represent to us:

(a) That you own more than 90% of the outstanding Common Stock of Hendler Creamery Company, Incorporated, a corporation duly organized and existing under the laws of the State of Maryland (hereinafter called "your Company"), and more than 90% of the outstanding Preferred Stock of said Company, and control more than 20% of the outstanding Prior Preference Stock of said Company.

(b) The Company has an authorized capital stock consisting of 30,000 shares of Common Stock without par value, 20,000 shares of Preferred Stock without par value and 30,000 shares of Prior Preference Stock of the par value of $100 each. All of the said authorized Common Stock and Preferred Stock is outstanding and 12,600 shares of Prior Preference Stock is outstanding. The Prior Preference Stock is subject to redemption on 30 days notice at 107½ plus accrued dividends, on any dividend date, the dividend dates being January 1st, April 1st, July 1st and October 1st, in each year. The Prior Preference Stock carries cumulative dividends at the rate of 7% per annum.

The Company has three wholly owned subsidiaries, namely, the Clover Ice Cream Company, the Horn Ice Cream Company, and the Supreme Ice Cream Company; the entire outstanding capital stock of the latter company having recently been acquired by your Company for 2,350 shares of the Prior Preference Stock of your Company. The Horn Ice Cream Company has recently acquired the Baltimore plant and the Baltimore business of Southern Dairies, Inc., including inventories and accounts receivable, for approximately the sum of $1,166,000.00 in cash.

All of the said wholly owned subsidiary companies are duly organized Maryland corporations.

Your Company has no bonds, mortgages or funded debt authorized or outstanding, except $675,000 principal amount of First Mortgage 6% Convertible Twenty Year Gold Bonds issued under a mortgage dated July 1, 1926, made to Commonwealth Bank of Baltimore, as Trustee, to secure an authorized issue of $1,000,000 of said bonds. These bonds are convertible, par for par, into Prior Preference Stock of your Company. Such conversion may be effected at any time prior to maturity, or, if the bonds be called for redemption, at any time before the date of the adoption of proper resolutions for the call of said bonds. Said bonds are subject to redemption on any interest payment date, on 30 days' previous notice, at 107½% of their principal amount plus accrued interest if redeemed on or prior to December 31, 1929. The interest dates on said bonds are January 1st and July 1st in each year.

(c) You have submitted to us balance sheets of your Company and of each of its subsidiary companies as of December 31, 1928, and profit and loss accounts of your Company, of the Horn Ice Cream Company or its predecessors in title and of the Supreme Ice Cream Company, for the calendar years 1926, 1927 and 1928; and profit and loss account of the Clover Ice Cream Company for the last eleven months of 1928. Said balance sheets correctly represent the financial condition of your Company and of its subsidiaries and/or their predecessors in title as of December 31, 1928 and said profit and loss accounts correctly represent the results of their operations for the periods covered thereby.

2. We hereby offer to purchase and you by your acceptance hereof agree to cause your Company to effect a reorganization pursuant to which it will sell, convey and transfer to us all its assets and business, of every kind and wheresoever located, including all the assets and business of its subsidiary companies, subject to all liabilities of your Company and of its subsidiaries as they exist at the date of closing of this transaction, but excepting liability for capital stock, tax liabilities accruing by reason of the sale to us and/or by reason of any business transacted by your Company or its subsidiaries subsequent to the date of the conveyance of the said assets and

business to us, and excepting additional income and/or excess profits taxes now or hereafter imposed upon your Company or its subsidiary companies in respect of business transacted and/or income accrued prior to January 1, 1929, and excepting also the legal fees of your counsel and counsel for your Company and its subsidiaries, in connection with this contract and the transfer hereby provided, all of which excepted liabilities are to be paid by you.

In consideration of the sale and conveyance to us of your Company's said assets and business, we agree:

(a) To provide for the liquidation of the said shares of your Company's Prior Preference Stock (plus such shares thereof as may be issued after the date hereof upon conversion of the said First Mortgage Bonds) at the option of the holders thereof, either (1) by the issuance to or upon the order of such holders of Prior Preference Stock as elect to receive the same, two shares of our full paid and non-assessable Capital Stock, of the par value of $50 for each three shares of your Prior Preference Stock; or (2) as to all other holders of your Prior Preference Stock, by payment of the sum of $107.50 per share thereof in cash plus accrued dividends thereon. In the event of the holders of said Prior Preference Stock neither availing themselves of their opportunity to exchange the same nor to sell the same, we are to make available to your Company by proper escrow the necessary funds, to wit, $107.50 per share, together with accrued dividends, in order to redeem said shares not so exchanged or sold. It is understood that all of the said Prior Preference Stock shall be called for redemption on July 1, 1929. No fractional shares of our stock will be issued.

(b) To issue to or upon the order of your Company 43,358 shares of our full paid and non-assessable Capital Stock of the par value of $50 per share.

Provided, however, that if prior to the closing of this transaction the par value of the shares of our stock is reduced from $50 each to $25 each, as is now contemplated, the amounts thereof to be issued in accordance with the preceding paragraphs (a) and (b) shall be correspondingly adjusted, namely, four shares of our stock, of the par value of $25 shall be issued for each three shares of

your Prior Preference Stock under clause (1) of paragraph (a); and 86,716 shares of our stock of the par value of $25 each, shall be issued under said paragraph (b). In either event the shares of our stock shall be listed on the New York Stock Exchange.

3. We shall notify you as soon as practicable after the date hereof whether the Haskins & Sells' audit hereinafter provided for, verifies the financial statements referred to in Clause (c) of paragraph One hereof, and whether our counsel approves the title of the real estate owned by your Company and its subsidiaries and the proceedings taken for the organization of said Companies and the issuance of their capital stock, it being understood that you will promptly furnish us with all title searches and other papers, books and documents as we may reasonably request.

Upon receipt of such notice, and not later than May 21st, 1929, you will cause your Company to adopt proper resolutions calling the said First Mortgage Bonds and the said Prior Preference Stock for redemption on July 1, 1929, and will mail to the holders of your Prior Preference Stock notice of redemption thereof together with notice of their option as set forth in sub-division (a) of Section two hereof.

It is a condition of our obligation hereunder that the said First Mortgage Bonds and Prior Preference Stock be called for redemption on July 1, 1929.

4. This offer and your acceptance hereof are subject as follows:

(a) To the verification by an audit of your books and accounts, to be made at our expense by Messrs. Haskins & Sells, of your financial statements referred to in Clause (c) of paragraph 1 hereof.

(b) To the satisfactory working out of all legal details, including without limiting the generality of the foregoing, the approval by our counsel of the regularity and sufficiency of the proceedings for the organization of your Company and its subsidiary companies and the issuance of its and their outstanding stock, of the regularity and sufficiency of the action taken by the stockholders and directors of your Company and its subsidiary companies in

connection with the authorization and performance of the agreement between us and of the titles of your Company and its subsidiaries to the properties owned by them respectfully and of the form and sufficiency of all instruments of conveyance and other instruments and agreements required by the terms hereof.

5. It is understood and agreed that a suitable formal contract, containing the detailed terms and provisions applicable to this transaction will be prepared and executed by us and by you, or, at our option, by your Company as soon as conveniently possible. Without prejudice to any other provision to be contained in such formal contract, it is understood that in addition to the matters referred to above, the same shall contain provisions substantially to the following effect, all of which are hereby agreed to by you:

(a) That the assets conveyed to us by your Company shall include all property, real and personal, tangible and intangible, owned by your Company, and its subsidiaries, wheresoever situate, all patents, patent rights, trademarks, trade names and good will and the exclusive right to do business under the present corporate names of your Company and its subsidiaries, and the business of said companies as going concerns;

(b) That the business of your Company and Clover Ice Cream Company since December 31, 1928, and the business of Horn Ice Cream Company and Supreme Ice Cream Company since your Company acquired the same, has been and until the closing of this transaction will be conducted in the ordinary normal course and that there has been and will be no change in the condition or value of your Company or any of its subsidiaries since the respective dates above mentioned except in the normal course of business and except money borrowed and paid and stock issued in the purchase of the stock of the Supreme Ice Cream Company and the Baltimore plant of Southern Dairies, Inc., and money borrowed by your Company to redeem its First Mortgage Bonds, and except that the assets of Clover Ice Cream Company may at your option be conveyed to the Horn Ice Cream Company.

(c) That since December 31, 1928, no dividend has been and until the closing of this transaction no dividend will be paid or declared on the outstanding capital stock of

your Company, except the regular dividend on its Prior Preference Stock at the regular dates therefor;

(d) That your Company and its subsidiaries are not and at the date of the closing of this transaction will not be parties to any contracts, express or implied, except such contracts as have been or will be made in the usual course of business.

(e) That if prior to the closing of this transaction any question of more than ordinary importance shall arise in connection with the conduct of the business of your Company, we shall be consulted in respect thereof before a decision is reached or action taken thereon.

(f) That you shall upon the closing of this transaction deliver to us your several agreements, whereby you shall undertake that for a period of five years you will not directly or indirectly engage or be interested in any competitive business in the States of Maryland and Delaware or in any other territory where the business of your Company and its subsidiaries is now being conducted.

(g) That you and such other officers and employees of your Company and its subsidiaries as we may desire shall upon the closing of this transaction deliver to us their several agreements whereby they will enter the service of and accept employment from our Company or one of our subsidiaries for a period of at least one year, at salaries mutually satisfactory.

(h) That you shall guarantee (1) correctness of the balance sheets of your Company and Clover Ice Cream Co. submitted to us as above stated subject only to such changes as shall have occurred subsequently to the dates of said balance sheets in the ordinary normal course of business and to such changes as are set forth in sub-division (b) of Section 5 hereof, (2) that the amount of the liabilities shown on the balance sheet of Supreme Ice Cream Company on December 31, 1928, submitted to us are correct and (3) that there have been and will be no change in the condition or value of Horn Ice Cream Company and/or Supreme Ice Cream Company since the respective dates when your Company acquired the same to the date of the closing of this transaction except only such changes as shall have occurred during said period in the ordinary normal course of business.

(i) That your Company shall cooperate with us in such manner as may reasonably be required to permit the organization by us of a new corporation or corporations, with names similar to or identical with the names of your Company and its subsidiaries and the qualification of such new corporation or corporations in all jurisdiction where your Company and/or its subsidiaries does business; that upon the closing of this transaction your Company and its subsidiaries will be dissolved and liquidated as soon as conveniently possible, the proceedings in that connection to be taken by your counsel but under the supervision of Messrs. Master & Nichols.

(j) That neither your Company nor any of its subsidiaries is or at the closing of this transaction will be a party to any suit or litigation, except the usual so-called "accident suits" and that such accident suits, if any, are sufficiently covered by insurance and will be handled by responsible insurers, except you carry no insurance on claims arising from presence of foreign matter in your products.

(k) That all properties owned by your Company and its subsidiaries which are insurable against loss by fire are and at the closing of this transaction will be covered by fire insurance written by responsible insurers in amounts sufficient to prevent liability for co-insurance.

6. It is contemplated that this transaction will be closed at our office, No. 350 Madison Avenue, New York City, not later than June 21, 1929; provided that either you or we shall be entitled to a reasonable adjournment beyond that date to complete preparations for closing.

If the foregoing correctly states the understanding between us, please sign the acceptance at the end hereof and this letter and your said acceptance will then constitute the agreement between us, pending the preparation and execution of the more formal contract above mentioned.

Very truly yours,
THE BORDEN COMPANY.
By (Sgd.) Arthur W. Milburn,
President.

ACCEPTED: April 16th, 1929.
(Sgd.) L. Manuel Hendler.
(Sgd.) Nathan Lebovitz.

Thereupon plaintiff, L. MANUEL HENDLER, took the stand as a witness of lawful age, who, after first being duly sworn, was examined and testified as follows:

That he now resides in Baltimore, Maryland, where he has lived since April, 1929. That he is a director of the Borden Company. That in April, 1929, he was president of Hendler Creamery Company and its subsidiaries. That when Creameries, Inc., income tax of approximately $69,000 was assessed against him as transferee, it was paid to Galen L. Tait, then Collector of Internal Revenue. That Galen L. Tait was not in office when this suit was brought in July, 1934. That after consummation of the transaction between Creameries, Inc., and the Borden Company in June, 1929, he continued to be associated with the Borden Company in charge of the Southeastern Division, which contained all companies originally comprising the old Hendler Company and its subsidiaries, plus one or two small companies taken over since. That at the time of the transaction of June 21, 1929, he was the largest stockholder of Hendler Creameries, Inc., and received the largest block of Borden stock, which he still retains.

Whereupon to further sustain the issues on his part, plaintiff called NATHAN L. LEBOVITZ, a witness of lawful age, who, after being duly sworn, was examined and testified as follows:

That he is Vice President and Secretary of Hendler Creamery Company. That in April, 1929, he was Vice President and Secretary of the old Hendler Creamery Company. That after consumation of the transaction between the Borden Company and Hendler Creamery Company, he continued to be and still is associated with the Borden Company. The Borden Company organized a new corporation known as the Hendler Creamery Company. That prior to April, 1929, and also on May 21, 1929, the Borden Company's capital structure consisted only of common stock and the company had no funded indebtedness. That the right of Hendler bondholders to exercise their conversion privilege and to exchange their bonds for prior preferred stocks had ceased the day before the meeting of the Board of Directors calling the bonds for redemption, which was on May 14, 1929.

Whereupon Mr. Russell, of counsel, on behalf of the defendant, moved that the testimony of the witness relating to whether the right of Hendler bondholders to convert their bonds into Prior Preference Stock had ceased before the meeting of the Board of Directors on May 14, 1929, be stricken out in that the question was one of law which should be brought out not by the opinion of the witness, but by the particular contracts.

To which the Court replied, "If there is a controversy about it it will have to be proven legally. If there is no controversy about it I think it quite unnecessary to take the time and expand the record by putting in a lot of papers about an issue which does not exist. With that understanding I overrule the objection," to which ruling of the Court counsel of the defendant duly excepted.

Whereupon to further sustain the issues on his behalf, plaintiff introduced a certain instrument in writing, dated June 21, 1929, designated "chattel deed" intended to convey all of its assets and executed by Hendler Creamery Company, Inc., and the Borden Company, which document was thereupon designated as plaintiff's "Exhibit Lebovitz 1" and received into evidence. Said exhibit is set forth herein, in so far as relevant to this appeal, in haec verba, to wit:

PLAINTIFF'S EXHIBIT LEBOVITZ NO. 1.

THIS CHATTEL DEED, made this 21st day of June, 1929 by and between HENDLER CREAMERY COMPANY, INCORPORATED, hereinafter sometimes termed the "Seller", first party, and THE BORDEN COMPANY, hereinafter sometimes termed the "Purchaser", second party.

WITNESSETH:

WHEREAS, HENDLER CREAMERY COMPANY, INCOPORATED, a corporation organized and existing under and pursuant to the Laws of the State of Maryland, has heretofore agreed to sell and convey to THE BORDEN COMPANY, a corporation organized and existing under and pursuant to the Laws of the State of New Jer-

sey, all of the property, assets, rights, business and good will of the Seller of whatsoever kind and wheresoever situated, for the considerations and upon the terms and conditions set forth in a certain contract dated May 25, 1929, heretofore entered into between said The Borden Company and Hendler Creamery Company, Incorporated.

NOW, THEREFORE, in consideration of the premises and of the sum of One Dollar ($1.00) lawful money of the United States to the Seller paid by the Purchaser, and for other good and valuable considerations, including Eighty-six thousand seven hundred and sixteen (86,716) shares of the full paid and non-assessable capital stock of said The Borden Company of the par value of $25 each, receipt of which by the Seller is hereby acknowledged, the Seller does hereby grant, sell, assign, transfer, deliver, convey and set over unto the Purchaser and to its successors and assigns, as of the day of the date of this agreement, all of the property, assets, rights, business and good will of the Seller of whatsoever kind and wheresoever situated, as provided in said contract of May 25, 1929.

The property, assets, rights and business of the Seller hereby transferred and conveyed include, among other things, all of the following (provided, however, that no specific enumeration or word of particular application herein contained shall in any way limit or impair the scope, intent or effect of any general description or word of general application herein contained), viz:

A. (Here follows enumeration of properties, chattels, etc., conveyed).

B. (Here follows enumeration of properties, chattels, etc., conveyed).

C. (Here follows enumeration of properties, chattels, etc., conveyed).

D. (Here follows enumeration of properties, chattels, etc., conveyed).

E. (Here follows enumeration of properties, chattels, etc., conveyed).

F. All claims against the United States or any State or Municipal Government, or any officer, agent or employee thereof, for refund of taxes paid by the Seller of

its predecessors in interest; and the Seller covenants that it will execute and deliver to the Purchaser all such authorizations, powers of attorney and other papers as shall be necessary to enable the Purchaser to prosecute and to collect upon such claims.

G. (Here follows enumeration of properties, chattels, etc., conveyed).

H. (Here follows enumeration of properties, chattels, etc., conveyed).

I. All the business of the Seller as a going concern and all the good will and trade name thereof (including the exclusive right to do business under the names "Hendler Creamery Company, Incorporated," "The Horn Ice Cream Company", "The Supreme Ice Cream Company" and "The Clover Ice Cream Company"), and all rights, privileges, immunities and exemptions owned or used by the Seller which it has legal power to convey.

J. (Here follows enumeration of properties, chattels, etc., conveyed).

K. (Here follows enumeration of properties, chattels, etc., conveyed).

FIRST. The Seller hereby covenants, warrants and agrees that it has good and unencumbered title to the property and assets hereby sold, transferred, assigned and conveyed, and to each and every part thereof, and full right to sell, assign, transfer and convey the same, subject only to exceptions as are expressly set forth or permitted in said contract dated May 25, 1929 between the Purchaser and Seller and to no other exceptions whatsoever.

SECOND. The Seller further covenants and agrees to execute and deliver to the Purchaser, its successors and assigns, all such further or separate assignments, agreements, conveyances, transfers and other instruments that the Purchaser or its successors or assigns may at any time reasonably request for the better assuring to it or to them of the title to the said property and assets and all the right, title and interest of the Seller therein and thereto.

THIRD. It is the intention of the parties hereto that separate deeds for the real estate conveyed by the Seller to the purchaser shall be executed and delivered by the Seller and duly recorded; that assignments of all trademarks, patents, copyrights, leases, and all such other instruments and definitive bills of sale, which may be required to vest the title to the said properties and assets in the Purchaser, shall also be executed and delivered by the Seller to the Purchaser.

FOURTH. In consideration of the conveyance and transfer hereby above made, the Purchaser assumes and agrees to pay all the indebtedness and liabilities whatsoever of the Seller and of the several subsidiaries of the Seller whose assets and business shall be conveyed to the Purchaser pursuant to said contract of May 25, 1929, as the same exist immediately prior to the execution and delivery of this instrument. It is, however, expressly understood and agreed that the liabilities so assumed by the Purchaser do not and shall not include (1) any capital stock liability; (2) any income or excess profits taxes incurred by the Seller or by either or any of the said subsidiary companies, by reason of the conveyance of its assets and business to the Purchaser hereunder; (3) any tax incurred by the Seller or by any subsidiary company whose property and assets the purchaser elects to take in respect of business transacted by the Seller or by any such subsidiary company and/or income accrued to the Seller or to any subsidiary company subsequent to the execution and delivery of this instrument to the Purchaser; (4) any additional income and or excess profits taxes now or hereafter imposed upon the Seller or upon any subsidiary company in respect of business transacted and/or income accrued prior to January 1, 1928; or (5) the legal fees of counsel for the Seller and its subsidiaries in connection with the conveyance provided for by said contract of May 25, 1929, and the fees and expenses of the liquidating or redemption agent for the Prior Preference Stock of the Seller.

IN WITNESS WHEREOF, said Hendler Creamery Company, Incorporated, and said THE BORDEN COMPANY have caused their respective corporate seals to be hereto affixed, attested by their respective Secretaries or

Assistant Secretaries, and these presents to be subscribed with their respective corporate names by their proper officers thereto duly authorized, pursuant to due resolutions by their respective Boards of Directors, in duplicate counterparts, as of the twenty-first day of June, 1929.

HENDLER CREAMERY COMPANY, INCORPORATED.

By L. MANUEL HENDLER, (Seal)
President.

In the Presence of:

GRENVILLE S. SEWALL.

Attest:
NATHAN A. LEBOVITZ,
Secretary.

THE BORDEN COMPANY.

By A. JOHNSTON,

Vice-President (Seal).

Attest:

W. H. HEBMAN.

(2 ACKNOWLEDGMENTS HERE OMITTED).

Thereupon plaintiff's witness continued his testimony as follows, to wit:

That between May 21, 1929, and June 21, 1929, there was no change in the assets and liabilities of the Hendler Company other than those occurring in the ordinary course of business and during that time no money was borrowed by the corporation to be used for the purpose of paying off the Hendler bonded indebtedness. That no satisfaction piece was furnished by the Hendler Creamery Company to the Borden Company because the bonds were not paid off at the time of closing. That during the negotiations there was discussion of the possibility of delay in the closing date beyond July 1. That the Borden Company elected under the contract to take the assets instead of the stock of the wholly owned subsidiaries of the Hendler Creamery Company.

Whereupon in answer to an inquiry of the Court, counsel for plaintiff read into the record certain in-

formation taken from "Exhibit R," attached to the stipulation, said exhibit consisting of Creameries, Inc., income tax return for 1929, which showed a statement of liabilities as of April 1, 1929, the effective date of the acquisition of the assets of Creameries, Inc., by the Borden Company, said liabilities at that time consisting of the following:

Notes payable	$1,050,000.
Accounts payable	130,410.78
First mortgage bonds	668,000.

That none of the liabilities assumed by the Borden Company were paid by Hendler Creamery Company, Inc., subsequently Creameries, Inc. That on July 1, 1929, the new Hendler Creamery Company, organized by the Borden Company, borrowed $900,000 from local banks and paid $1,050,000 of bank indebtedness existing at that time. That the new Hendler Company, to which the assets were conveyed, was incorporated on June 19, 1929. That the accounts payable would have been paid by the new Hendler Company in the ordinary course of business within thirty days. That after the conveyance from the old Hendler Company to the Borden Company, the new Hendler Company issued to the Borden Company its stock in exchange for the assets, including the cash, accounts receivable, etc., transferred by the old Hendler Company to the Borden Company.

Whereupon counsel for defendant cross-examined the witness, said Nathan L. Lebovitz, who testified further as follows, to wit:

That the old Hendler Creamery Company sold its first mortgage bonds in July, 1926, the amount of bonds so sold aggregating $700,000, face value, and said company realized $930 per $1,000 bond.

Whereupon a statement entitled "Statement of Provision for Redemption of Bonds" was identified, introduced as plaintiff's "Exhibit No. 2" and received by the Court. Said exhibit is set forth in haec verba as follows, to wit:

PLAINTIFF'S EXHIBIT 2.

CREAMERIES, INC.

Statement of Provision for Redemption of Bonds and Prior Preference Stock of Hendler Creamery Co. by The Borden Company.

(FIRST MORTGAGE BONDS)

Date		Par Value of Bonds Outstanding	Premium	Interest	Total Cash
	Principal amount of bonds converted into similar amount of prior preference stock	$174,000.00			
May 24, 1929	Bought and held on account by Commonwealth Bank of Balto.	127,000.00	819.40	3,048.00	130,867.40
June 27, 1929	Cash advanced to trustee	345,000.00	25,875.00	10,350.00	381,225.00
June 27, 1929	Purchased from outsiders	22,000.00	125.00	330.00	22,205.00
	Treasury bonds	7,000.00			
		675,000.00	26,569.40 (A)	13,728.00 (B)	534,297.40

PRIOR PREFERENCE STOCK

		Prior Preference Stock	Stock of The Borden Co.	Cash
June 21, 1929	Cash advanced to Commonwealth Bank of Baltimore for adjustment of fractional shares exchanged and stock to be exchanged	13981 shrs.	18590 shrs.	$4,201.12
June 21, 1929	Cash for redemption	359 shrs.		39,220.75
		14340	18590	43,421.87

ALBERT BAUER,
Internal Revenue Agent.

Thereupon ALBERT BAUER, a witness of lawful age, after first being duly sworn, was examined on behalf of defendant, and testified as follows:

That his occupation was that of an Internal Revenue Agent of the Baltimore Division and that he had been employed in such capacity for sixteen years. That he is a certified public accountant and prepared the statement introduced into evidence and marked Plaintiff's Exhibit No. 2," said document having been attached to and forming a part of a second supplemental report dated May, 1932, in which the income tax liability of the Hendler Company was determined to the extent of approximately $58,000 in excess of the sum previously assessed. That there was a total outstanding bonded indebtedness of $675,000, par value, of which $174,000 was converted into prior preference stock. That $127,000 of the bonds were bought and held on account by the Commonwealth Bank of Baltimore on instructions of the Borden Company. That the bank notified the Borden Company they had the bonds in hand and the Borden Company sent a check to pay for them.

Whereupon plaintiff's counsel, Mr. Semans, in reply to a question of the Court, stated for the purpose of the record that the bond transactions were handled in the following manner: At the time of the redemption of the bonds the Borden Company directed the Commonwealth Bank to take these bonds held for its account and cancel them. The Sharpless-Hendler Company, of Wilmington, Delaware, a wholly owned subsidiary of the Borden Company, owned $22,000.00 of the Hendler Company bonds. The Borden Company purchased these bonds from the Sharpless-Hendler Company and delivered them to the Commonwealth Bank, as Trustee, for cancellation. The $7,000.00 worth of Treasury bonds were bonds that were carried in the treasury of the old Hendler Creamery Company that they had bought from time to time on the open market during the year previous. They had been bought out of the general funds of the old Hendler Creamery Company as a matter of investment, and these bonds were transferred to the Borden Company, together with the other assets.

That on March 31, 1931, he rendered a report covering the calendar year 1929 of Creameries, Inc., proposing an additional liability of $11,852.09, based on numerous adjustments such as organization expenses which are unallowable deductions and the disallowance of unamortized discount and premium on bonds. That a second report was prepared by him and submitted on September 25, 1931, recommending a decrease in the proposed additional tax liability from $11,852.09 to $5,591.76. That this adjustment, resulting in the decrease in the deficiency, was the result of a protest rendered by the taxpayer and a conference held in the office of the Revenue Agent in Charge, when the unamortized discount on the first mortgage bonds and the premium on bonds were allowed practically in their entirety, having previously been disallowed as proper deductions. That the unamortized discount thus allowed amounted to $30,342.61 and the premium on bonds amounted to $26,569.40. That at the conference in the Revenue Agent's office the following persons were present: R. M. Dodds, tax consultant for the Borden Company; a Mr. Aidt, Chief Accountant for Hendler; Mr. John D. Branner, Assistant Treasurer of Hendler Creamery Company; Dr. C. D. Hahn, the Government conferee, besides

himself. That the conference was held September 22, 1931, and the conference report was dated a few days later. That there were three major items contended by the taxpayer. That one of them was the disallowance of the unamortized discount, another was the disallowance of the premium as a deduction, and the other some organization expenses. The taxpayer presented a written form of protest contending that the bonds were never the obligation of the Borden Company at any time, but they were always the obligation of the Hendler Creamery Company. That in his first report he had contended these obligations were bond obligations and followed the assets when they were transferred in June and as such, when the obligation followed the assets, the unamortized discount and premium were not a deduction to the Hendler Creamery Company. That the taxpayer in his protest contended that he (Revenue Agent Bauer) was wrong and that these obligations were the obligations of the Hendler Company primarily, finally and forever and they never were the obligations of the Borden Company. That this contention was confirmed in a verbal statement, though he did not recollect which one of the representatives made the statement. That the conferee, Dr. Hahn, decided that these obligations were those of the Hendler Company and not of the Borden Company and therefore were a proper deduction to the Hendler Company. That his report was amended in accordance with this decision and the tax liability accordingly reduced. That as the result of the second report, the unamortized discounts and premium were allowed as deductions and the same was closed as far as the Baltimore office was concerned by the taxpayer signing an agreement on Form 870 waiving restrictions as to the assessment. That he thought the Government sent the taxpayer a bill for the amount of the reduced deficiency and that he paid it. That in accordance with the usual custom a report of the conference, together with the petition of the taxpayer and the supplemental report of the agent, were sent on to Washington for final review. That the taxpayer did not receive a copy of the conference report. That the matters were reviewed by the Bureau at Washington, who came to the conclusion that there was an element of tax in the transaction to the extent of the cash that the Borden Company paid for the redemption of the Hendler mortgage bonds.

That this thought originated entirely with Washington and he went to Washington and conferred on the matter and a second supplemental report was made in accordance with the recommendations originating in Washington. That this second supplemental report was dated May 20, 1932, and recommended an additional tax liability of $58,772.72. That the taxpayer paid the reduced deficiency, to which he had consented, in the approximate sum of $5,500, but that this was not a complete final assessment, being subject to review in Washington. That in the meantime the case was being reaudited in Washington and it was decided that the taxpayer owed $58,000 more. That the Government is at liberty to reopen cases from time to time unless the taxpayer files Form 806, which is a final closing form as to all parties concerned, and of course providing there is not element of fraud in it. That Form 870, which was executed in this case, was not a final closing form.

Whereupon counsel for plaintiff cross-examined the witness, Albert Bauer, who testified further as follows, to wit:

That he could not definitely say who did the talking in the Revenue Agent's office, but that the Government representatives did not deal with Mr. Dodds as a representative of the Borden Company, because so far as the Government representatives were concerned, the taxpayer was the Hendler Creamery Company and they would only deal officially with a representative of that company. That he did not know if Mr. Dodds had a power of attorney filed. That he presumed he had, in connection with his examination and first report, copy of the first contract and other papers but he could not say he got all the information he asked for because he had considerable difficulty in trying to determine where the liability of the mortgage bonds lay. That he had a conference in New York and others in Baltimore and the matter seemed to enlighten itself at the conference. That the contentions made at the conference were the same contentions made in the protest. That to the best of his knowledge the verbal arguments were wholly in line with the written protest submitted. That the contentions made at the conference were the same contentions made in the protest. That everything is in the protest that was said either as a fact or as a legal argument at the conference. That the reduction

in his second report from approximately $11,000 to a deficiency of approximately $5,500 was based entirely upon the conference and the protest. That he thought the opinion of Washington resulting in the additional tax of $38,000 arose primarily from the matters filed by the taxpayer protesting the original $11,000 tax liability in which the taxpayer stated that the bonds were always the liability of the Hendler Creamery Company. That at the time of the original examination it appeared that no one could really give a satisfactory answer as to the liability of the bond issue. That there seemed to be quite a difference of opinion and it was only when the petition was filed by the taxpayer that the Government representatives had some definite written statement of facts to work on. That he had several conferences trying to tie the taxpayer's representatives down on the question of where the liability on the bond issue lay. That he had a copy of the reorganization agreement, but when he read that, he was still in the air as to the fact. He knew the assets were transferred on June 21 but it was very vague about the mortgage.

Thereupon the plaintiff and defendant rested. The case having been closed by both parties, the following prayers were submitted by defendant:

EXCEPTION NO. I

DEFENDANT'S PRAYER NO. I

"The defendant prays the Court to rule as a matter of law that the satisfaction and cancellation of $494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) procured by the Borden Company at a cost of $534,297.40 pursuant to an agreement between said corporations constituted part of the consideration for the acquisition of the assets of the former by the latter on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by said Creameries, Inc., within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. II

DEFENDANT'S PRAYER NO. II

"The defendant prays the Court to rule as a matter of law that the promise or undertaking of the Borden Company to procure the satisfaction and cancellation of $494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) which was effected in May and June, 1929, at a cost to said Borden Company of $534,297.40 constituted part of the consideration for the acquisition of the assets of said Creameries, Inc., on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by the latter corporation within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. III

DEFENDANT'S PRAYER NO. III

"The defendant prays the Court to rule as a matter of law that the surrender for cancellation by the Borden Company to the Commonwealth Bank on, to wit, June 27, 1929, of $149,000 face value of bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.), said bonds having been acquired in May and June, 1929, at a cost of $153,072.40, including interest, pursuant to its promise or undertaking constituted money or other property received and not distributed by said Creameries, Inc., the obligor on the bonds as part of the consideration for the transfer of its assets to said Borden Company on, to wit, June 21, 1929."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. IV

DEFENDANT'S PRAYER NO. IV

"The defendant prays the Court to rule as a matter of law that the payment of $381,225 in cash by the Borden Company to the Commonwealth Bank to satisfy bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) of the face value of $345,000, said bonds having been called for retirement at a price of 107½ plus interest, constituted money or other property received and not distributed by said Creameries, Inc., as part of the consideration for the conveyance of its assets to said Borden Company on, to wit, June 21, 1929."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. V

DEFENDANT'S PRAYER NO. V

"The defendant prays the Court to rule as a matter of law that the plaintiff has failed to sustain his burden of proving that Creameries, Inc. (formerly Hendler Creamery Co., Inc.) was not taxable with respect to gains of not less than $534,297.40 realized upon sale or other disposition of its assets to the Borden Company in 1929 pursuant to certain agreements between said corporations dated April 16, 1929, and May 21, 1929, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. VI

DEFENDANT'S PRAYER NO. VIII

"In the event the Court holds that the sum of $534,297.40 was improperly taxed to Creameries, Inc., as money or other property received in accordance with the provisions of Section 112(d)(2) of the

Revenue Act of 1928, the defendant prays the Court to rule as a matter of law that the entire gain of $6,608,712.65 realized in 1929 by Creameries, Inc, upon sale or other disposition of its assets to the Borden Company was taxable income received by the former and not exempt from tax in that the consideration received by said Creameries, Inc., did not consist (a) solely of stock or securities within the meaning of Section 112(d)(4) of the Revenue Act of 1928, nor (b) of stock or securities and money or other property received and not distributed within the meaning of Section 112(d)(2) of the Revenue Act of 1928."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

EXCEPTION NO. VII

DEFENDANT'S PRAYER NO. IX.

"The defendant prays the Court to rule as a matter of law that the plaintiff is estopped from now claiming a different effect to the contracts and agreements between Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, and which the representatives of said corporation urged at a conference with representatives of the Commissioner of Internal Revenue held in September, 1931, upon the basis of which protest and conference the Commissioner allowed deductions for unamortized discount and for premium upon bonds retired, reducing the proposed deficiency by $6,260.33 and adopting the taxpayer's view so insistently urged that the bonded indebtedness of Creameries, Inc., was not assumed with other liabilities by Borden Company on, to wit, June 21, 1929, but was at the time of payment by the latter corporation the obligation of said Creameries, Inc., and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

Which prayer was rejected by the Court and to the ruling of the Court rejecting said prayer, defendant duly excepted.

The Court then, after argument by counsel for plaintiff and defendant, announced its rulings as follows:

EXCEPTION NO. VIII

"The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of $501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of $1,050,000; and merchandise accounts payable in the amount of $130,410.78. * * * "

" * * * In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date and took the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. * * * "

to which said rulings of the Court the defendant duly excepted.

EXCEPTION NO. IX

"First: As to 'Reorganization.' As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a 'reorganization.' "

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. X

"Second: As to the taxability of the item of $534,297.40. In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation assumes liabilities of the transferor, such assumption of liabilities constitutes the receipt by the transferring corporation of 'other property or money' which when not distributed to stockholders of the transferring corporation, is therefore taxable despite the provisions of 112(d). This contention is, I think, untenable. * * * "

"* * * Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times reenacted. * * * "

to which said rulings of the Court the defendant duly excepted.

EXCEPTION NO. XI

"* * * It seems quite unreasonable to suppose that 'property' in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

"Apart from the literal meaning of the section, the assumption of liabilities in this case was not within the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which pro tanto were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any 'other property or money' by Borden's assumption of Hendler's liabilities."

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XII

"There is no lexicological difficulty involved in including creditors within the scope of 'distribute' as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because 'distribute to creditors' is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than payment in full. But there is no linguistic infelicity in the phrase 'distribute in pursuance of the plan of reorganization among creditors and stockholders', because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than 'distribute' in this connection. (Cf. Baar &

Morris, Hidden Taxes in Corporate Reorganizations, supra, p. 266)."

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XIII

"* * * The kind of estoppel here set up, known as equitable estoppel, or estoppel in pais, is a principle of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel in pais is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situations in Swartz vs, Commissioner, 69 F.(2) 633, and Stevens Mfg. Co. vs. United States, 8 F. Supp. 720, were quite different from that here."

EXCEPTION NO. XIV

"The final result is that the plaintiff is entitled to recover the amount sued for by it, $69,554.69, with interest thereon from date of payment, less $6,260.33 with interest thereon from the date the same was payable."

to which said ruling of the Court the defendant duly excepted.

EXCEPTION NO. XV

The Court further announced its ruling as follows:

"Verdict for the Plaintiff in the sum of Sixty-two Thousand, One Hundred Forty-five Dollars and Eighty-nine Cents ($62,145.89), together with interest thereon from April 15, 1933, according to law."

to which said ruling of the Court the defendant duly excepted.

And now in furtherance of justice and that right may be done, the defendant tenders and presents the foregoing as the bill of exceptions in this appeal from the action of

the Court and prays that the same may be settled, allowed, signed and sealed by the Court and made a part of the record in this case.

BERNARD J. FLYNN,
United States Attorney
for the District of Maryland.

Approved as to form:

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS.

The aforegoing bill of exceptions duly allowed, settled, signed and sealed this 30th day of April, 1937.

W. CALVIN CHESNUT,
United States District Judge.

OPINION.

Including Findings of Facts and Conclusions.

Filed 30th December, 1936.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND.

L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Company, Incorporated), Plaintiff,
vs.
United States of America, Defendant.
} Law No. 5419

Chesnut, D. J.,

In this income tax case the controlling factor is the proper application of the corporation "reorganization" sections of the Revenue Act of 1928 to the facts of the

case, to be found in a stipulation supported by elaborate documentary evidence and some little verbal testimony.

On June 21, 1929, Hendler Creamery Company, Inc., a Maryland corporation, engaged in the manufacture and distribution of ice-cream in Baltimore City and vicinity, transferred all of its assets to the Borden Company, a corporation of the State of New Jersey. In consideration therefor the Borden Company assumed all the then outstanding liabilities of Hendler (with minor exceptions not material save in one particular hereinafter mentioned) and gave to Hendler 106,306 shares of the Borden Company common stock and $43,421.87 in cash, all of which was immediately distributed to the stockholders of the Hendler Company. The transaction was consummated in accordance with a prior written agreement between the parties dated May 21, 1929, called a "reorganization agreement." The Hendler Company thereafter entirely discontinued business operations and, after filing its income tax return in 1929, was dissolved, having in the meantime changed its name to Creameries, Inc. Distribution of stock and cash to the stockholders of the Hendler Company was in pursuance of the plan of reorganization.

The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of $501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of $1,050,000; and merchandise accounts payable in the amount of $130,410.78. The bonded indebtedness was completely paid and satisfied by the Borden Company on June 27, 1929, by surrendering to the Commonwealth Bank of Baltimore as Trustee, $156,000 par value of the bonds and paying to the Trustee $381,225 in cash, to retire the remaining $345,000 face value of bonds which were redeemable at a premium of 7½%. The Trustee then formally released the mortgage. The total cost to the Borden Company, including the cash paid to the Trustee and the amount paid in the acquisition of the bonds acquired and surrendered by the Borden Company was $534,297.40. The bank loans were paid off shortly after July 1, 1929, and the merchandise accounts were paid in due course within about thirty days thereafter. The former business of the Hendler Company was con-

tinued by the Borden Company through a newly organized corporation also named the Hendler Company.

By the plan of reorganization the Borden Company assumed the ordinary current income tax payable by the old Hendler Company for 1929, but expressly excluded any liability for excess income taxes, if any, arising from the reorganization transaction. In the income tax return prepared for the old Hendler Company (subsequently named Creameries, Inc.), no tax was shown to be due in consequence of the reorganization, but credit was taken as against ordinary gross income for two items of the alleged deductible expense, which included certain unamortized bond discount and premiums paid for redemption of bonds, both relating to the bond issue above mentioned. The effect of these deductions if allowable was to decrease the corporation's income tax for 1929 in the amount of $6,260.33. In due course the return was locally examined by Revenue Agent Bauer, a Field Agent connected with the Baltimore office for about sixteen years and experienced as a certified public accountant. In his report of the audit he made the point that the bond discount and premium was not a proper deduction and therefore the tax payable should be increased by $6,260.33. Other adjustments, not here in controversy, further increased the tax by $5,591.75; so that the agent recommended a deficiency assessment of $11,852.08. This was contested by representatives of Creameries, Inc., the letter of protest being signed by L. Manuel Hendler as president. As a result of an ensuing conference in Baltimore with representatives of Creameries, Inc., including the tax expert or accountant of the Borden Company, the local agents representing the Collector, including Mr. Bauer, were persuaded that the deductions of the bond discount and premium should be allowed. A report to this effect was then made to the Commissioner and resulted in a deficiency assessment of only $5,591.76, which was duly paid by the Borden Company for Creameries, Inc. But later, in 1932, re-consideration was given in Washington by the Commissioner of Internal Revenue to the case, as a result of which it was determined that there was due a further deficiency in the amount of $58,772.72. The basis of this determination as stated in the Commissioner's letter of June 4, 1932, to the taxpayer, was that, under the reorganization agreement the payment by the Borden

Company of $534,294.40, in satisfaction of the bonded indebtedness of the old Hendler Company, amounted to a "constructive receipt" of that sum by Hendler which, *not being distributed to its stockholders*, became taxable under the reorganization sections of the 1928 Revenue Act, as a part of the whole calculated profit to the old Hendler Company by virtue of the transaction with the Borden Company. The amount of the total profit, based on the then market price of the Borden stock as determined by the Commissioner, was $6,608,713.65. Whether the action of the Commissioner in taxing this item of $534,297.40 was correct is the principal question in this case.

The additional deficiency as assessed by the Commissioner could not be paid by Creameries, Inc., because its assets had been conveyed to Borden and all its net receipts from Borden had been distributed to its stockholders. A deficiency assessment against the stockholders of the old Hendler Company was thus rendered necessary, as transferee of the corporate assets, and by subsequent agreement L. Manuel Hendler individually was substituted as the representative of the stockholders. He, having paid the additional assessment of $58,772.72, plus interest of $10,781.97 on April 15, 1933, to the then Collector, and his petition for refund thereof having been denied, has brought this suit for the recovery of the sum paid, $69,554.69, with interest from date of payment. The suit is brought against the United States directly and not against the former Collector of Internal Revenue in Baltimore, who was no longer in office at the time of the institution of the suit. 26 U. S. C. A. s. 41(20).

The theory of the Government in justifying the tax in question is that the general rule with respect to income taxation both on individuals and corporations, requires an inclusion in income of "the entire amount of the gain or loss" resulting from the sale or exchange of property, except as otherwise provided by statute (Rev. Act of 1928, s. 112 (a); 45 Stat. 791); and the Government contends in this case that the statutory exceptions do not exclude the taxability of the item in controversy. We are thus brought directly to the consideration of the statutory exceptions which are relied upon by the plain-

tiff in this case. Section 112 (b) (4) of the 1928 Act provides:

> "No gain or loss shall be recognized if a corporation, a party to a reorganization, exchanges property in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization."

And Section 112 (d) provides:

> "If an exchange would be within the provisions of sub-section (b) (4) of this section, if it were not for the fact that the property received in exchange consists not only of stock or securities, permitted by such paragraph to be received without the recognition of gain, but also of *other property or money* then—
>
> (1) If the corporation receiving such other property or money *distributes it in pursuance of the plan of reorganization,* no gain to the corporation shall be recognized from the exchange, but
>
> (2) If the corporation receiving such other property or money *does not distribute it in pursuance of the plan of reorganization,* the gain, if any, to such corporation shall be recognized, but in an amount not in excess of the sum of such money, and the fair market value of such other property so received, which is not so distributed."

"Reorganziation" is defined by section 112 (i) as follows:

> "(1) The term 'reorganization' means (a) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, *or substantially all the properties of another corporation,* or (b) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (c) a recapitalization, or (d) a mere change in identity, form or place of reorganization, however affected."

(The crucial phrases have been italicized.) Similar provisions are contained in the Revenue Acts of 1924, 1926, 1932 and 1934.

The questions which are presented by the application of these statutory tax provisions to the facts of the case are (1) whether the inter-corporate transaction between Hendler and Borden was a "reorganization" within the statutory definition; (2) whether the item of $534,297.40 was properly taxed by the Commissioner as "other property or money" *received* by Hendler and not *distributed* "in pursuance of the plan of reorganization"; and (3) if said item was not properly taxable, then is the amount otherwise recoverable by the plaintiff subject to the deduction of $6,260.33, by which the income tax of Hendler for the year 1929 was decreased by the deduction of bond discount and premium above referred to.

First: As to "Reorganization". As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a "reorganization". The Commissioner so treated it in imposing the tax, and it was not disputed in the oral argument in this case by counsel for the Government, but the contrary is somewhat faintly urged in its brief subsequently filed. The point requires no extended discussion in view of the recent decisions. The definition in section 112 (i) (1) (A) includes in "reorganization" a case where one corporation acquires "substantially all the properties of another corporation". In this case Borden acquired all properties of Hendler, which received in exchange a definite and material amount of Borden stock, which represented a "substantial part of the value of the thing transferred." Thereafter Hendler transacted no business and shortly was dissolved, after distribution of the Borden stock to the stockholders of Hendler who thus acquired a substantial continuing interest in the Borden Company. The transaction was genuinely in the nature of a merger. Whatever uncertainty may have heretofore existed as to whether such a transaction was a reorganization has been completely dispelled by the recent decisions of the Supreme Court in Helvering v. Minnesota Tea Co., 296 U. S. 378; Helvering v. Watts, 296 U. S.

387; G. & K. Mfg. Co. v. Helvering, 296 U. S. 389, and Nelson Co. v. Helvering, 296 U. S. 374. See also C. H. Mead Coal Co. v. Commissioner, 72 F. (2d) 22 (C. C. A. 4); Starr v. Commissioner, 82 F. (2d) 964 (C. C. A. 4); Western Industries Co. v. Helvering, 82 F. (2d) 461 (C. A. D. C.); Coleman v. Commissioner, 81 F. (2d) 455 (C. C. A. 10).

Second: *As to the taxability of the item of $534,297.40.* In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation *assumes liabilities* of the transferor, such assumption of liabilities constitutes the *receipt* by the transferring corporation of *"other property or money"* which when not distributed to *stockholders* of the transferring corporation, is therefore taxable despite the provisions of 112 (d). This contention is, I think, untenable. No judicial decision is cited in support of it although there have been very many such reorganizations since the statute in similar form was first enacted; and there have been numerous decisions holding reorganizations (involving this feature) nontaxable, without discussion of the point. See Coleman v. Commissioner, 81 F. (2d) 455, 456; G. & K. Mfg. Co. v. Commissioner, 76 F. (2d) 454 (C. C. A. 4); (reversed 296 U. S. 389, and remanded to Board of Tax Appeals); Starr v. Commissioner, 82 F. (2d) 964 (C. C. A. 4); cert. denied, 298 U. S. 680; Watts v. Commissioner, 75 F. (2d) 981 (C. C. A. 2), affd. 296 U. S. 387; Tulsa Oxygen Co. v. Commissioner, 18 B. T. A. 1283; Frank Keel, 31 B. T. A. 212; National Pipe & Foundry Co. v. Commissioner, 19 B. T. A. 242; Fashion Center Building Co. v. Commissioner, 31 B. T. A. 167; Baar & Morris, Hidden Taxes in Corporate Reorganizations, p. 261. Cf. Dickey v. Commissioner, 32 B. T. A. 1283, and Brons Hotels, Inc., v. Commissioner, 34 B. T. A. 376 (six Commissioners dissenting). Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times re-enacted. (United States v. Hermanos, 209 U. S. 337; Helvering v. Bliss, 293 U. S. 144, 151); and evidently the Commissioner did not act on this view of the statute in making the assessment in this case because he under-

took to tax *only one item* of the liabilities assumed by Borden, and left untaxed the much larger amount of $1,180,410.78, representing the bank loans and accounts payable which were also assumed and promptly paid by the Borden Company. Clearly an assumption of liabilities is not "money", and it is not sufficient to say it may be as valuable as money, as the word in the statute is not ambiguous, and therefore does not permit such latitude of construction. While the word "property" when used without qualifying context, has a very broad meaning and may include intangible rights, such as obligations (Fidelity and Deposit Co. v. Arenz, 290 U. S. 66, 68, 69), there seems to be no reasonable basis for the construction of the term, as used in the statute, to cover an assumption of liabilities by the transferee corporation. Here, as elsewhere, its meaning must be judged by the context. Of course the assumption if not discharged gives rise to a *chose in action*, which lawyers know is a property right, but neither lawyers nor layman, in common thought, would be apt to think of an assumption of liability as "property". A liability itself is certainly not property, and a tax on *all property* would not cover the assumption by another of one's liability. On the other hand, a tax on net worth might very well take into consideration the amount of a liability of the taxpayer which has been assumed by a solvent other person. An assumption by a purchaser of a mortgage debt on property bought is of course a valuable consideration to the vendor, and may properly be considered in ascertaining the whole value realized by the vendor-mortgagor, for purposes of comparison with the original cost to him, to determine the amount of loss or gain as taxable income. (See Brons Hotels, Inc., v. Commissioner, 34 B. T. A. 376.) But it is not the function of 112 (d) to measure the amount of a profit or gain. It assumes there has been gain, and determines whether and to what extent it shall be recognized. 112 (b) (4) provides that there shall be no tax payable if the exchange of property is solely for stock or securities of another corporation; and 112 (d) further provides there shall be no tax even if, in addition to stock and securities, the transferring corporation also *receives* "other property or money" if the latter is *distributed* in pursuance of the plan of reorgani-

zation; but if not so distributed, then the gain in the transaction must be included in income for taxation, "in amount not in excess of the sum of such money, and the fair market value of such other property so received, which is not so distributed". Here the word "property" is not only classed with stock, securities and money, but, like them, it is also clearly implied that it is to be susceptible of *receipt* by the corporation, *distribution* pursuant to the plan of reorganization and of *ascertainable market* value. It seems quite unreasonable to suppose that "property" in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

Apart from the literal meaning of the section, the assumption of liabilities in this case was not within the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which *pro tanto* were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any "other property or money" by Borden's assumption of Hendler's liabilities.

Counsel for the Government also contends the item of $534,297.40, even if not taxable merely because an assumed liability, is nevertheless taxable in this particular case, by virtue of the special provisions of the reorganization agreement with respect to the bonded debt of the Hendler Company. This requires a more detailed reference thereto than has heretofore been made. There was an informal written agreement between Borden and Hendler in offer and acceptance form by letter dated April 16, 1929, which contemplated exchange of all the property of Hendler and its three wholly owned subsidiaries for certain cash and stock of Borden, subject to all liabilities with minor exceptions. No definite closing date was therein provided, but evidently it was contemplated it might be later than July 1, 1929, because it was stipulated that Hendler should call its bonds for redemption on July 1, 1929, and borrow the money to pay them, to be included in its debt taken over by Borden. A more formal contract was executed on May 21, 1929, whereby

in paragraph II(C) Borden did "assume and agree to pay all indebtedness and liabilities whatsoever of your Company and of the said subsidiary companies as the same shall exist at closing of title to us hereunder", with certain exceptions. "Closing of title" was defined as the date that Borden received title to the property, except as to income tax accounting which (by paragraph V) was fixed as of April 1, 1929. June 21, 1929, was fixed as the closing date, subject to adjournment to a later date if reasonably necessary. Again it was stipulated that Hendler should call its bonds for redemption on July 1, 1929, and could borrow the money to pay therefor and include the same in its debts assumed by Borden. (Paragraph III(F)). Hendler did call its bonds as stipulated; did *not* borrow any money to pay them; the properties were actually deeded over to Borden on June 21, 1929, and the cash and stock then delivered to Hendler. Bonds were then outstanding to the par value of $501,000, including $7,000 held in the treasury of Hendler. In May and June, Borden bought in the market and elsewhere $149,000 of the bonds at a cost of $153,072.40, and about July 1, surrendered them with the $7,000 treasury bonds, to the trustee for cancellation, and also paid the trustee on June 27, $381,225 for redemption of the remaining $345,000 bonds, at par, interest and premium. The trustee then satisfied the mortgage by appropriate instrument.

On these facts the Government contends the cost to Borden of satisfying the bonded indebtedness, $534,297.40, was "money constructively received" by Hendler and not distributed to stockholders, and therefore taxable, being less than the real "gain" to Hendler, at then prevailing market prices. Special reference is made to the contract provision (IIIB), "at or prior to the closing of title to us the said mortgage will be satisfied as provided by Section 3 of Article IV thereof, and we shall be furnished with a satisfaction piece at the closing". But it must be remembered that the contract also provided that Hendler could borrow the money to redeem the bonds and include the amount in the liabilities to be assumed. In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date a[illegible]ook

the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. None of the money that paid these debts was ever received or distributed by Hendler. It is apparent from the whole of the contract that Borden took the property subject to the liability of the cost of redeeming the bonds, and the corporate resolutions of both Hendler and Borden also show this was the clear intention of the parties. If the closing date had actually been after July 1st, the bonds would have been retired but the liabilities assumed by Borden increased by the cost thereof. In closing before July 1st, Borden took the property subject to the bonds, without the added cost of retirement in Hendler liabilities, but with the obligation on Borden to directly defray the cost. In the deed of June 21, 1929, from Hendler to Borden, the latter expressly assumed and agreed to pay "all the indebtedness and liabilities whatsoever" of Hendler then existing, which of course included the outstanding bonds, which had been called for redemption July 1st following.

What the Government specifically urges is that Borden's payment of the bonds was a payment made for Hendler and therefore a constructive receipt and disbursement of the money for its own account and in payment of its own debt. But this was not the case. As between Borden and Hendler the debt was then Borden's and not Hendler's, by virtue of the contract and what was done by the parties. In closing before July 1, 1929, with the bonds outstanding Borden assumed them by the express provisions of the contract and the deed. Likewise it waived the stipulation for its benefit as to the satisfaction of the bonds before closing, but thereby did not increase at all the cost to itself of the whole transaction. If Borden had not waived the "satisfaction piece", then the money to satisfy the bonds would have been borrowed by Hendler, and would have furnished no basis for the particular contention now advanced. The cost of the bond redemption was not taxable by the contract as worded or as executed. If there were any difference, the latter would prevail as to taxability. United States vs. Phillis, 257 U. S. 156, 172; American Security & Trust Co. vs.

Tait, 5 F. Supp. 337, 341, (D. C. Md.). But the item cannot properly be made taxable by a strained construction of the transaction resulting from a combination of both what the contract provided and what the parties actually did, when it is not taxable on either basis separately considered. The really important question here is whether the payment when made by Borden was for its own account, in its relation to Hendler, or for the latter's account. Clearly it was the former.

The time of payment, only a few days after the closing, is stressed as indicating that it was Hendler's debt that was being paid by Borden. But that is quite immaterial in the case of the bonds as in the case of the other liabilities. The defendant's counsel cites Old Colony Trust Co. vs. Commissioner, 279 U. S. 716; United States vs. Boston & Maine Railroad Co., 279 U. S. 732; and United States vs. Kirby Lumber Co., 284 U. S. 1, to show that there may be a constructive receipt of ordinary income for tax purposes, but we are not dealing here with what constitutes ordinary income, but with the construction of "other property or money" in this particular section of the law. Counsel for the Government also rely upon the case of The Liquidating Company vs. Commissioner of Internal Revenue, 33 B. T. A. 1173, in support of their contention. In many respects the reorganization there was like that here, but on the precise point here involved there was a material difference which makes the case distinguishable. The Liquidating Company was a Delaware corporation formerly called Standard Creameries, Inc., engaged in business in California. Its properties were acquired in 1929 by the Borden Company pursuant to a plan of reorganization in general outline very similar to the contract in this case; but it differed in an important formal respect with regard to the provision for the payment of the outstanding bond issue of the Liquidating Company. Its bonds were convertible into common stock, and at the time of making the agreement the conversion privilege had not expired. The amount of the bonds that would be outstanding at the time of settlement was, therefore, not known, and in the reorganization agreement Borden did not assume the payment of the outstanding bonds together with the other liabilities, but in a separate clause of the contract it agreed to "provide the funds necessary

for the redemption on September 1, 1929, of your said $1,298,000 of ten-year 6½% Convertible Debenture Bonds, or so many thereof as shall not before that time be converted into common stock of your Company." Pursuant to the agreement Borden deposited with the trustee in the trust indenture securing the bonds funds sufficient to redeem them. The Board, after pointing out that Borden had not assumed the payment of the bonds with other liabilities, held that the money paid by Borden to the trustee was cash received by The Liquidating Company and taxable because not distributed to stockholders. That case, therefore, differs from the present in the important respect (at least so far as form is concerned) that Borden did not assume the payment of the bonds as its own obligation but agreed to furnish the funds to redeem the bonds.

The importance of the form of the transaction as affecting tax liability in such cases, in the opinion of the Board of Tax Appeals, appears from the case of the Minnesota Tea Company v. Commissioner, 34 B. T. A. 145, decided by the Board shortly after the case of The Liquidating Company, with which it may be contrasted. The Minnesota Tea Company, pursuant to a plan of reorganization, transferred its assets to another corporation in exchange for voting trust common stock and $426,842.52 in money. It retained the stock but immediately distributed the money among its stockholders who, however, agreed to and did pay liabilities of the Tea Company in the amount of $106,472.72. In this case it will be noted that the other corporation did not assume the liabilities of the Tea Company but acquired the property free of debts which had to be discharged by the Tea Company. Nevertheless the Board held that as all the money received by the Tea Company was first distributed to stockholders, who then paid the liabilities, there was no taxable feature in the transaction. It declined to hold that there was a *constructive* distribution of the money by the corporation to its creditors, which made the $106,472.72 taxable under the ruling in the case of The Liquidating Corp. supra. Here again obviously the form was treated as controlling. And if the form is sufficient to control the decision there would seem to be even less

reason in the instant case for holding the transaction taxable than in the Tea Company case; and also sufficient to distinguish the case of The Liquidating Company, as decided by the Board.

There is another difficulty in the position of the defendant in this case. In addition to showing that the money for the redemption of the bonds was received by the corporation, it must also show that it was not distributed *in pursuance of the plan of reorganization.* On this point the position taken by the defendant is that the only distribution within the statute is a distribution *to stockholders;* and therefore a distribution to creditors, even though required by the plan of reorganization, subjects the money so paid to taxation. In support of its position the defendant relies on the case of The Liquidating Company, supra, where the Board of Tax Appeals did so hold. That decision seems to have been based principally on West Texas Ref. & Dev. Co. vs. Commissioner, 68 F. (2d) 77, 80 (C. C. A. 10), where it was briefly stated that, in a reorganization, money received by a corporation which is used to pay debts and not distributed to stockholders is taxable as otherwise a realized gain would escape taxation. The matter was not further discussed probably in view of the fact that on the main point of the case the transaction was held not a reorganization but a sale. The decision was in 1933, prior to the above-mentioned decisions of the Supreme Court applying the reorganization statute. The same question was noted but not decided, on the first appeal from the Board in the Minnesota Tea Company case, 76 F. (2d) 797, 799, 803 (C. C. A. 8), affirmed 296 U. S. 378. The case was remanded to the Board for determination of the point on the merits, and the Board then decided that the money used to pay debts was not taxable because it had first been distributed to the stockholders by whom the debts were paid. The decision was thus made to depend upon the mere form of the particular transaction. The practical importance of taxation in corporate reorganizations warrants more extended consideration of the question of whether money received and distributed or disbursed by a corporation in

payment of debts as required by the plan of reorganization, is taxable under the statute. (Note.)

Note: In the earlier case of National Pipe and Foundry Co. v. Commissioner, 19 B. T. A. 242, a corporate reorganization was held not taxable although a large sum had been received by the corporation and applied in payment of debts as required by the plan; but there was no discussion of the particular point. In Montgomery's Federal Income Tax Hand Book (1935-36), page 202, in discussing the meaning of distribution as used in the statute, the author says:

> "In Pinella's Ice & Cold Storage Co. v. Commissioner (287 U. S. 462), all the cash was used to pay creditors. The corporation was held to be taxable on other grounds but no question was made regarding the payment to creditors being a distribution. In the author's opinion a distribution to bondholders or general creditors should be considered a distribution under Section 112(d) if it is part of the reorganization plan. Very frequently, a reorganization can be effected in no other way."

See also Baar & Morris "Hidden Taxes in Corporate Reorganizations", p. 264, s. 15, where after discussion of this particular subject and a review of the National Pipe & Foundry Company case, the authors say:

> "Such a case is no different in any substantial respect from that in which the corporation 'acts merely as a conduit in passing the proceeds of sale on to its stockholders', the result being the same as the acquisition of all the stock, followed by liquidation. It would therefore appear to be consistent with the legislative purpose, as explained in the 'Statement of the Changes made in the Revenue Act of 1921 by the Treasury Draft and the Reasons Therefor', quoted above (at Sec. 4) and in the substantially identical reports of the House and Senate Committees, that no gain of the transferor corporation should be recognized in such a case."

Two thoughts are clearly expressed in Section 112 (d). One is that money or property received by the corporation and distributed in pursuance of the plan is not taxable to the corporation; the other is that money or other property so received and not so distributed, is taxable. Here the antithesis seems to be on distribution or retention by the corporation, and not distribution to stockholders or creditors. A third situation (the one with which we are here dealing) must be determined by a construction of the word "distribute" as used in the statute. Does it necessarily cover only a distribution *to stockholders*? The statute does not so say and the construction contended for by the defendant reads into the statute words ("to the stockholders") which do not expressly appear therein; and in so doing reads out of the statute (or at least gives little significance to) the phrase "in pursuance of the plan of reorganization." The construction must be within and not without the words of the

statute, and should if possible be consistent with the purpose of the enactment. Its legislative history is extensively reviewed in Mead Coal Co. vs. Commissioner, 72 F. (2d) 22, 27 (C. C. A. 4); Minnesota Tea Co. vs. Commissioner, 34 B. T. A. 145, and Baar & Morris, Hidden Taxes in Corporate Reorganizations, p. 244. It is, I think, apparent with reasonable clarity therefrom that the fundamental purpose of Congress was to remove from ordinary business transactions, in the nature of corporate mergers or reorganizations, the burden of heavy taxation on mere paper profits, and also to shift the ultimate incidence of taxation from the corporation to its stockholders where the corporate gain is distributed to them to be paid by them when actually realized.

In corporate mergers and reorganizations the assumption of liabilities and the payment of debts is a very usual feature. The principal purpose of the financial negotiations preceding the contract is to reach an agreement as to the price to be paid for the *net* value of the assets to be transferred. When price and terms have been agreed upon it is largely a matter of legal detail as to the method of paying the debts. The contract of reorganization may provide for this in any one of several ways; (1) the transferee may pay the transferor only the *net* worth of the assets, and assume the liabilities; or (2) the transferor, before the actual transfer, may apply the quick assets to extinguish the current liabilities, or (as in this case) convert funded into current liabilities by optional call for redemption and borrow the money to pay them; or (3) the transferee may pay to the transferor the gross value of the assets, but require the liabilities to be paid by the latter from the fund. The financial result to the transferor is exactly the same in all three cases. In (2) it is clear that the money used to pay the debts would not be taxable on any theory. In (1) it is also not taxable unless it is to be held that an assumption of liabilities itself makes the transaction taxable; but for the reasons already given, I have concluded that it does not. And there would seem to be no substantial reason for holding the transaction taxable in (3), the other case. To so hold would allow the mere form of the transaction to overcome the substance when clearly income taxability should be determined, within the statutory wording, by substance rather than form. United States vs. Phellis, 257 U. S. 156; Starr

vs. Commissioner, 82 F.(2d) 964, 968 (C. C. A. 4). If form alone is to be made the basis of decision as to taxability, the practical futility of reading into the statute the phrase, "to the stockholders" would appear from the Minnesota Tea Company case where the Board of Tax Appeals held that taxability was avoided by distributing the money to the stockholders with their agreement to pay the debts.

There is no lexicological difficulty involved in including creditors within the scope of "distribute" as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because "distribute to creditors" is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than paywent in full. But there is no linguistic infelicity in the phrase "distribute in pursuance of the plan of reorganization *among creditors and stockholders,*" because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than "distribute" in this connection. (Cf. Baar & Morris, Hidden Taxes in Corporate Reorganizations, supra, p. 266).

Counsel for the defendant points out that in other related sections of the statute (112(g) and 115) Congress has expressly limited "distribution" as there used to stockholders; but this sign post for construction at best points two ways, because in those sections the words "to stockholders" were imperatively required by the subject matter, which related to the taxation of the individual stockholders, while the section now being considered (112(d)) relates to the corporation itself, as distinct from its stockholders, and in this connection the word distribute was not followed by the words "to stockholders." By contrast its omission in this section may be regarded as significant. Of course, to be non-taxable, the money must have been distributed in accordance with the plan of reorganization. We are not considering a situation where money is received and retained by a corporation for its general corporate purposes.

The point has been discussed so far largely from the standpoint of the literal import of the wording of the statute, as its application to the facts of the case must of

course be not inconsistent with its language; but if the latter is considered sufficiently open to permit or require construction, then the basis of the decision should be the intent of the Act to be gathered from its provisions as a whole and as disclosed in its legislative history. As already indicated the central thought was to remove from ordinary business transactions the deterrent influence of immediate and possibly onerous taxation on merely paper profits. Obviously taxation to the corporation of money received by it and disbursed in payment of debts, as required by the plan of reorganization, would tend to frustrate this intent of the statute. It seems not a sufficient answer to say that in such case the tax must be imposed, otherwise a gain will escape taxation. The net gain to the corporation is not marked by money paid by it to creditors but by what it retains, or distributes to stockholders, and in the latter case they become ultimately liable to proper taxation on actually realized gain. As to this the evident thought of the statute was to postpone, rather than to exempt from, taxation. It is conceivable, of course, that the amount of the taxes, as finally realized by the Government, by such postponement, from the reorganization as the proximate cause, may be less, by the operation of the complex provisions of our income tax system, corporate and individual, than it would have been if the tax on the gain had been levied on the corporation, but this circumstance was entirely within the field of congressional power, and should not be allowed to impair the free operation of the statute to accomplish its major objective. Helvering vs. Bliss, 293 U. S. 144, 151. In this connection it is not inappropriate to note that by section 112(e) the corporation is not allowed to take credit in tax accounting for a loss in such case resulting from a reorganization. See Mead Coal Co. vs. Commissioner, 72 F.(2d) 22, 28 (C. C. A. 4).

I conclude, therefore, that money received by the corporation and applied in pursuance of the plan of reorganization to the payment of debts is not to be treated as a taxable gain to the corporation. But finally on this point it is to be observed that this is really not the crucial point in this particular case, because neither in form nor in substance, did Hendler receive any money or property which was not distributed to stockholders. As to form, the money used to pay the bonded debt was never actual-

ly received or distributed, or retained by the corporation; and as to substance, all that Hendler received in the transaction (other than a comparatively small amount of cash distributed to preferred stockholders) was common stock of Borden, representing the equity in its property, in exchange for the equity in Hendler property. The item of $534,297.40 was not taxable.

As to estoppel: The Government sets up an estoppel against the plaintiff. The circumstances on which this is based have already been stated. In the Hendler tax return for 1929 deduction was claimed for bond discount and premium which, if properly allowed, reduced the tax in the amount of $6,260.33. The Field Agent first disallowed the deduction but later, in consequence of a protest from the taxpayer, followed by a conference with tax counsel, the deductions were approved, and the tax so determined was paid. Later the Commissioner made the much larger deficiency assessment on the basis, partially at least, of the position taken by the taxpayer at that time as to the effect of the reorganization agreement. But the circumstances do not constitute an estoppel. There was no misrepresentation of fact, as all of the facts were fully and equally known to both the parties. What was advanced by the taxpayer's representative was merely a matter of opinion as to the application of the income tax law under admitted facts. The argument then stressed by the taxpayer seems to have been in substance that for the purpose of the income tax accounting of the taxpayer, the effect of the reorganization should be disregarded with respect to the bond redemption because the bonds continued to be the obligation of the taxpayer until actually redeemed. This was undeniably true as between Hendler and its bondholders, but not as between Hendler and Borden. The question as to what was the effect of the legal situation respecting the bonds as influencing the income tax return was clearly only a matter of opinion on the question of law and cannot properly be made the basis of an estoppel. United States vs. Scott, 69 F.(2d) 728, 732 (C. C. A. 1); Ward vs. Ward, 131 F. 946, 953; affirmed 145 F. 1023; Marshall vs. Security Co., 155 Md. 649, 653; 21 C. J. 1142, 1147. Furthermore, the Government has sustained as prejudice as a result of the taxpayer's contention because, if it was unsound, the tax saving by virtue of the allowance of bond discount and

premiums as deductions can now be recouped by the defendant, even though the time has expired for a deficiency assessment for the particular item. Lewis vs. Reynolds, 284 U. S. 281. The kind of estoppel here set up, known as equitable estoppel, or estoppel *in pais*, is a principle of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel *in pais* is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situation in Swartz vs. Commissioner, 69 F.(2d) 633, and Stevens Mfg. Co. vs. United States, 8 F. Supp. 720, were quite different from that here.

Third: The taxpayer's contention just referred to was, in my opinion, unsound and the position first taken by the Field Agent in disallowing the deductions for bond discount and premiums was correct. Although the reorganization did not itself directly then impose a tax on Hendler, it had the necessary incidental effect of relieving Hendler entirely from liability on the bond issue which was paid by Borden. Clearly Hendler could not reduce its proper tax for the current year by the amount of a bond premium which it had never paid. And as bond discount is merely an increased interest rate on bonds it follows that proper credit therefor necessarily disappeared when the obligation on the principal of the bonds itself was removed from Hendler's liabilities. Western Maryland Rwy. vs. Commissioner, 33 F.(2d) 695 (C. C. A. 4). The defendant is therefore entitled to a deduction in the amount of $6,260.33 from the principal amount claimed by the plaintiff.

The final result is that the plaintiff is entitled to recover the amount sued for by it, $69,554.69, with interest thereon from date of payment, less $6,260.33 with interest thereon from the date the same was payable. Counsel should agree upon this date and submit for approval the special form of verdict in this case, as required by 28 U. S. C. s. 284, as amended June 22, 1936 (49 Stat. 1746), on which judgment in the same form will be entered by the clerk in due course.

The parties have submitted a number of separate written requests for instructions which I have marked "granted" or "refused" respectively consistent with the conclusions herein, with exceptions noted for each of the parties as to each adverse ruling. It has not been necessary to rule on all the prayers submitted by the plaintiff. Many of them would have to be refused because while correctly stating a major proposition, they contain minor defects, or improper final conclusions.

This opinion is adopted as the findings of fact and conclusions required by the applicable statute, 28 U. S. C. A. s. 764; Atkinson vs. United States, 73 F.(2d) 214; United States vs. Tinsley, 63 F. 433 (C. C. A. 4). As the controversy in the case is over questions of law, and there is no dispute as to the facts, it is not deemed necessary to make more formal or specific findings of fact than are recited in the opinion, but if either of the parties desires them, they may be submitted for consideration.

W. CALVIN CHESNUT,
U. S. District Judge.

Dated:
December 30, 1936.

ASSIGNMENT OF ERRORS

Filed 10th April, 1937.

(Style of Court and Title Omitted)

Now comes the defendant, by Bernard J. Flynn, United States Attorney in and for the District of Maryland, and makes and files the following assignment of errors upon which the defendant will rely for the prosecution of its appeal from the judgment of this Court made and entered in the office of the Clerk of the District Court of the United States for the District of Maryland on the 11th day of January, 1937:

1. The District Court erred in refusing to direct a verdict for the defendant.

2. The District Court erred in refusing to dismiss plaintiff's action upon the merits.

3. The District Court erred in directing a verdict for the plaintiff for $62,145.89, with interest.

4. The District Court erred in failing and refusing to enter judgment in favor of the defendant.

5. The District Court erred in rendering and entering judgment for the plaintiff in the sum of $62,145.89, with interest thereon from April 15, 1933, or for any sum whatsoever.

6. The District Court erred in refusing "DEFENDANT'S PRAYER NO. 1," reading as follows:

> "The defendant prays the Court to rule as a matter of law that the satisfaction and cancellation of $494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) procured by the Borden Company at a cost of $534,297.40 pursuant to an agreement between said corporations constituted part of the consideration for the acquisition of the assets of the former by the latter on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by said Creameries, Inc., within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

7. The District Court erred in refusing "DEFENDANT'S PRAYER NO. II," reading as follows:

"The defendant prays the Court to rule as a matter of law that the promise or undertaking of the Borden Company to procure the satisfaction and cancellation of $494,000 face value bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) which was effected in May and June, 1929, at a cost to said Borden Company of $534,297.40 constituted part of the consideration for the acquisition of the assets of said Creameries, Inc., on, to wit, June 21, 1929, and is 'money or other property' received and not distributed by the latter corporation within the meaning of Section 112(d)(2) of the Revenue Act of 1928, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

8. The District Court erred in refusing "DEFENDANT'S PRAYER NO. III," reading as follows:

"The defendant prays the Court to rule as a matter of law that the surrender for cancellation by the Borden Company to the Commonwealth Bank on, to wit, June 27, 1929, of $149,000 face value of bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.), said bonds having been acquired in May and June, 1929, at a cost of $153,072.40, including interest, pursuant to its promise or undertaking constituted money or other property received and not distributed by said Creameries, Inc., the obligor on the bonds as part of the consideration for the transfer of its assets to said Borden Company on, to wit, June 21, 1929."

9. The District Court erred in refusing "DEFENDANT'S PRAYER NO. IV," reading as follows:

"The defendant prays the Court to rule as a matter of law that the payment of $381,225 in cash by the Borden Company to the Commonwealth Bank to satisfy bonds of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) of the face value of $345,000, said bonds having been called for retirement at a price of 107½ plus interest, constituted money or other property received and not distributed by said Creameries, Inc., as part of the consideration for the

conveyance of its assets to said Borden Company on, to wit, June 21, 1929."

10. The District Court erred in refusing "DEFENDANT'S PRAYER NO. V," reading as follows:

"The defendant prays the Court to rule as a matter of law that the plaintiff has failed to sustain his burden of proving that Creameries, Inc. (formerly Hendler Creamery Co., Inc.) was not taxable with respect to gains of not less than $534,297.40 realized upon sale or other disposition of its assets to the Borden Company in 1929 pursuant to certain agreements between said corporations dated April 16, 1929, and May 21, 1929, and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

11. The District Court erred in refusing "DEFENDANT'S PRAYER NO. VIII," reading as follows:

"In the event the Court holds that the sum of $534,297.40 was improperly taxed to Creameries, Inc., as money or other property received in accordance with the provisions of Section 112(d)(2) of the Revenue Act of 1928, the defendant prays the Court to rule as a matter of law that the entire gain of $6,608,712.65 realized in 1929 by Creameries, Inc., upon sale or other disposition of its assets to the Borden Company was taxable income received by the former and not exempt from tax in that the consideration received by said Creameries, Inc., did not consist (a) solely of stock or securities within the meaning of Section 112(b)(4) of the Revenue Act of 1928, nor (b) of stock or securities and money or other property received and not distributed within the meaning of Section 112(d)(2) of the Revenue Act of 1928."

12. The District Court erred in refusing "DEFENDANT'S PRAYER NO. IX," reading as follows:

"The defendant prays the Court to rule as a matter of law that the plaintiff is estopped from now claiming a different effect to the contracts and agreements between Creameries, Inc. (formerly Hendler Creamery Co., Inc.) and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, and which the representatives of said

corporation urged at a conference with representatives of the Commissioner of Internal Revenue held in September, 1931, upon the basis of which protest and conference the Commissioner allowed deductions for unamortized discount and for premium upon bonds retired, reducing the proposed deficiency by $6,260.33 and adopting the taxpayer's view so insistently urged that the bonded indebtedness of Creameries, Inc., was not assumed with other liabilities by Borden Company on, to wit, June 21, 1929, but was at the time of payment by the latter corporation the obligation of said Creameries, Inc., and, therefore, the verdict of the Court sitting as a jury should be for the defendant."

13. The District Court erred in making and entering its findings and conclusions that the Borden Company assumed the bonded indebtedness of Creameries, Inc., the Court's holding being indicated by excerpts from the opinion as follows:

"The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of $501,000 par value of first mortgage bonds which had been called for redemption on July 1, 1929; current bank loans in the amount of $1,050,000; and merchandise accounts payable in the amount of $130,410.78. * * * "

" * * * In closing the transaction before July 1, 1929, before the bonds were redeemable, and while they were still outstanding, Borden waived the requirement for satisfaction of the mortgage at the closing date and took the property subject to the bond issue, which then became one of the liabilities of Hendler assumed at the closing by Borden, just as it assumed the bank loans and current accounts payable; and Borden itself paid all of them within a month thereafter. * * * "

14. The District Court erred in its conclusion of law that the transaction between Creameries, Inc., and the Borden Company was a statutory reorganization, the Court's holding being indicated by an excerpt from the opinion as follows:

"First: As to 'Reorganization'. As a result of recent authoritative decisions, it is clear that the transaction was within the statutory definition of a 'reorganization'. * * * "

15. The District Court erred in its conclusion of law that Creameries, Inc., did not receive money or property in the sum of $534,297.40 by reason of the assumption of indebtedness of said corporation in that amount by the Borden Company, the Court's holding being indicated by an excerpt from the opinion as follows:

"Second: As to the taxability of the item of $534,-297.40. In support of the taxability of this item the Government submits the broad contention that wherever, in a reorganization, the transferee corporation assume liabilities of the transferor, such assumption of liabilities constitute the receipt by the transferring corporation of 'other property or money' which when not distributed to stockholders of the transferring corporation, is therefore taxable despite the provisions of 112(d). This contention is, I think, untenable. * * * "

16. The District Court erred in its finding and conclusion that the Government's contention that the assumption of liability by the transferee resulted in the receipt of taxable income was contrary to the administrative practice for more than ten years, the Court's holding being indicated by an excerpt from the opinion as follows:

"* * * Furthermore the contention now advanced is contrary to the administrative practice for more than ten years, under the statutes so worded and several times reenacted. * * * "

17. The District Court erred in its conclusion of law that the assumption of liabilities is not property within the meaning of Section 112(d) of the Revenue Act of 1928, the Court's holding being indicated by an excerpt from the opinion as follows:

"* * * It seems quite unreasonable to suppose that 'property' in this context includes an assumption of liability, which in ordinary thought and speech does not have these characteristics.

"Apart from the literal meaning of the section, the assumption of liabilities in this case was not within

the substantial import of the statute. In financial substance Hendler merely exchanged its equity in its property for shares of stock in the Borden Company which represented only the equity therein, and which pro tanto were diminished in value by the Hendler liabilities assumed by Borden. Neither in form nor substance did Hendler receive any 'other property or money' by Borden's assumption of Hendler's liabilities."

18. The District Court erred in its conclusion of law that the term "distributes" as used in Section 112(d) of the Revenue Act of 1928 includes sums paid to creditors and is not limited to distributions to stockholders in pursuance of the plan of reorganization, the Court's holding being indicated by an excerpt from the opinion as follows:

"There is no lexicological difficulty involved in including creditors within the scope of 'distribute' as used in the section under consideration. It might possibly be considered inapt to use the word if the distribution were limited to creditors only, because 'distribute to creditors' is such a familiar phrase in bankruptcy and insolvency, where it most often implies something less than payment in full. But there is no linguistic infelicity in the phrase 'distribute in pursuance of the plan of reorganization among creditors and stockholders,' because what is implied is a division of the whole fund between two classes, in accordance with their respective rights. Indeed it would be difficult to select a more appropriate word than 'distribute' in this connection. (Cf. Baar & Morris, Hidden Taxes in Corporate Reorganizations, supra, p. 266)."

19. The District Court erred in its conclusion of law that plaintiff is not estopped from claiming a different effect to the contracts and agreements between Creameries, Inc., and the Borden Company from that which he urged and contended for in his sworn protest of June 8, 1931, the Court's holding being indicated by an excerpt from the opinion as follows:

"* * * The kind of estoppel here set up, known as equitable estoppel, or estoppel in pais, is a principle

of equity, justice and good conscience; and it would be manifestly inequitable to apply that principle here. At the time the argument was advanced by the taxpayer, it related to a particular situation or phase of income tax accounting and neither party then had in view the different principle subsequently applied by the Commissioner in imposing the very much larger deficiency tax. Estoppel in pais is a valuable shield for defense, but it may not properly be converted into a powerful sword for attack. The situations in Swartz vs. Commissioner, 69 F.(2d) 633, and Stevens Mfg. Co. vs. United States, 8 F. Supp. 720, were quite different from that here."

WHEREFORE, the defendant prays that the judgment of the District Court for the District of Maryland be reversed, and that the said District Court be directed to enter judgment dismissing the complaint herein, and for such other and further relief as to the Court may seem just.

BERNARD J. FLYNN,
United States Attorney.

STIPULATION AS TO RECORD ON APPEAL

Filed 29th April, 1937.

(Style of Court and Title Omitted)

It is stipulated and agreed by and between the parties to this cause that the transcript of record on appeal to the United States Circuit Court of Appeals for the Fourth Circuit in said cause shall consist of the following:

1. Plaintiff's declaration.
2. Defendant's pleas.
3. Docket entry of joinder of issue.
4. Opinion of the Court.
5. Verdict and Judgment.
6. Order of Court dated February 15, 1937, extending time for filing Bill of Exception.
7. Order of Court dated March 25, 1937, extending time for filing Bill of Exceptions.
8. Bill of Exceptions.
9. Defendant's prayer for allowance of appeal.
10. Order of Court allowing appeal.
11. Assignment of errors.
12. Docket entries.

13. Stipulation as to record on appeal.
14. Memorandum of the Clerk.
15. Order to transmit record.
16. Clerk's Certificate.

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Attorneys for Plaintiff.

BERNARD J. FLYNN,
United States Attorney
Attorney for Defendant.

MEMORANDUM OF THE CLERK.

1. Petition for appeal filed 10th April, 1937.
2. Appeal granted 10th April, 1937.
3. Appeal by United States of America.
4. Citation dated 10th April, 1937. (Service acknowledged).

ORDER TO TRANSMIT RECORD.

And, thereupon, it is Ordered by the Court here that a transcript of the record and proceedings of the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit and the same is transmitted accordingly.

Test:

ARTHUR L. SPAMER,
Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND, TO WIT:

I, ARTHUR L. SPAMER, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the aforegoing is the true transcript of the record and proceedings of the said District Court in the therein entitled case of L. Manuel Hendler, as Transferee of Creameries, Inc. (formerly Hendler Creamery Co., Inc.) vs. United States of America, No. 5419 Law Docket, together with all things thereunto relating in the therein entitled cause as agreed to and made up per stipulation of counsel for the respective parties filed in said cause.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of said District Court this 28th day of May, 1937.

ARTHUR L. SPAMER,
Clerk of said District Court.

(Seal)

PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 4202

UNITED STATES OF AMERICA, APPELLANT

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.), APPELLEE

Appeal from the District Court of the United States for the District of Maryland, at Baltimore.

May 31, 1937, the transcript of record is filed and the cause docketed.

Same day, the original petition for appeal, order allowing appeal, and citation are certified up under section 7 of Rule 14.

Same day, petition and order extending the time for filing the transcript of record and docketing the case to the 31st day of May 1937, are filed.

Same day, the appearance of James W. Morris, Assistant Attorney General, and Sewall Key, Special Assistant to the Attorney General, is entered for the appellant.

June 2, 1937, twenty-four copies of the printed record are filed.

June 5, 1937, the appearance of Randolph Barton, Jr., Joseph Addison, and William R. Semans is entered for the appellee.

Same day, stipulation to place case at the foot of the docket for argument at the June term, 1937, is filed.

June 14, 1937, the appearance of Arnold Raum, Special Assistant to the Attorney General, is entered for the appellant.

ARGUMENT OF CAUSE

July 7, 1937 (June term, 1937), cause came on to be heard before Parker, Northcott, and Soper, Circuit Judges, and is argued by counsel and submitted.

Judgment

Filed and Entered August 7, 1937

United States Circuit Court of Appeals, Fourth Circuit

No. 4202

UNITED STATES OF AMERICA, APPELLANT

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.), APPELLEE

Appeal from the District Court of the United States for the District of Maryland.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in this cause, be, and the same is hereby, affirmed.

August 7th, 1937.

MORRIS A. SOPER,
U. S. Circuit Judge.

On another day, to-wit, September 7, 1937, the mandate of this Court in this cause is issued and transmitted to the District Court of the United States for the District of Maryland, at Baltimore, in due form.

Same day, the original petition for appeal and order allowing appeal are returned to the Clerk of the District Court at Baltimore, Maryland.

Clerk's certificate

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause, as the same remain upon the records and files of the said Circuit Court of Appeals.

In testimony whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, this 19th day of October A. D. 1937.

[SEAL] CLAUDE M. DEAN, *Clerk,*
U. S. Circuit Court of Appeals, Fourth Circuit.

Opinion

August 6, 1937

SOPER, *Circuit Judge:* The United States has appealed from the decision of the District Court holding that under Section 112 of the

Revenue Act of 1928 the computation of the taxable gain of the Hendler Creamery Co., Inc., resulting from the performance of a reorganization agreement with the Borden Company, should not take account of the bonded debt of the Hendler Company which was assumed by the Borden Company.

On June 21, 1929, in conformity with a "reorganization agreement" of May 21, 1929, the Hendler Company transferred all of its assets to the Borden Company in exchange for 105,306 shares of the latter's stock, $43,421.87 in cash and the assumption by the Borden Company of all of the outstanding liabilities of the Hendler Company, consisting of $501,000 first mortgage bonds, current bank loans of $1,050,000, and merchandise accounts of $130,410.78. As a result of the transaction, the Hendler Company made a total calculated profit of $6,608,713.65 based on the current market price of the Borden stock. After the transaction the Hendler Company discontinued business, filed its income tax return for 1929 and dissolved.

The Hendler bonds were subject to redemption on any interest date at 107½. In accordance with an understanding which preceded the agreement of May 21, 1929, the Board of Directors of the Hendler Company resolved on May 15, 1929, to call the bonds for redemption on July 1, 1929. The Borden Company, through the purchase of some of the bonds and the redemption of the rest, performed its promise to assume the payment of the bonds at a total cost to it of $534,297.40. This sum did not pass through the Hendler Company but was paid directly to the bondholders. The Hendler Company did not include it in its income tax return for 1929 nor any part of the profit realized in the reorganization. The Commissioner reached the determination that while the total profit on the exchange was not taxable, the item of $534,297.40 was taxable and made a deficiency assessment of $58,772.72 with interest of $10,781.97, which was paid by L. Manuel Hendler, as transferee. The present suit was filed to recover these amounts after a claim for refund had been denied. The District Court ordered the refund, finding a verdict for $62,145.89 which represented the amount of the plaintiff's claim less an offset based on circumstances not involved in the pending case.

Section 112 of the Revenue Act of 1928, 45 Stat. 791, provides in part as follows:

"Sec. 112. Recognition of Gain or Loss.

"(a) General Rule.—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

"(b) Exchange solely in kind.—

* * * * * * *

"(4) Same—(Stock for Stock Reorganization)—Gain of Corporation.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * * * *

"(d) Same—(Gain from Exchanges not Solely in Kind—Gain of Corporation.—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

"(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed."

The contention of the United States is that under section 112 (a) of the statute the entire amount of the gain or loss upon the sale or exchange of property is recognized in computing the income tax, unless the transaction falls within one of the exceptions enumerated in the section; and that the only exceptions relied upon by the taxpayer, to wit: section 112 (b) (4) and 112 (d) are not applicable to the facts of the case. It is not denied that there was a reorganization as defined in section 112 (i); see Helvering vs. Minnesota Tea Co., 296 U. S. 378; Helvering vs. Watts, 296 U. S. 387; G. & K. Mfg. Co. vs. Helvering, 296 U. S. 389; but it is said that the taxpayer did not exchange its property in pursuance of a plan of reorganization solely for stock or securities in the Borden Company within the terms of section 112 (b) (4), but also received $43,421,87 in cash and an assumption of the taxpayer's liability which included the bonded indebtedness discharged at a cost of $534,297.40; and it is contended that this assumption of indebtedness was not money or property within the true construction of section 112 (d), or if it was money or property, it was not distributed in pursuance of the plan of reorganization within the terms of the section. Hence, it is said that the item of $534.297.40 should be added to the taxable income.

At the outset we are assailed by the doubts aroused by the failure of the government to press its argument to the conclusion which would seem to follow if its premises, based upon a literal interpretation of the language, are sound. If the assumption of the bonded indebtedness did not constitute money or property, but nevertheless represented taxable value received by the taxpayer, it would seem that the transaction was not covered by the literal terms of either section 112 (b) (4) or section 112 (d), and that therefore the entire profit of $6,608,713.85 was taxable under section 112 (a) of the statute; and on the other hand, if such assumption did constitute money or property not distributed under section 112 (d), manifestly the assumption of the current bank loans in the amount of $1,050,000, and of the merchandise accounts in the amount of $130,410.78 was of the same nature and these sums should have been added to the taxable profit. The omission of the Government in these respects is difficult to understand.

In our opinion, however, the decision of the District Court was correct. We do not question the rule that the payment of an obligation of a taxpayer by another person constitutes income to the taxpayer. Old Colony Trust Co. vs. Commissioner, 279 U. S. 716; United States vs. Boston & M. R. Co., 279 U. S. 932; Gold & Stock Telegraph Co. vs. Commissioner, 83 F. (2d) 465; Houston Belt & Terminal Ry. Co. vs. United States, 250 Fed. 1; Douglas vs. Willcuts, 296 U. S. 1, 9; and of course the assumption not only of bonded indebtedness but also of all other forms of indebtedness owing by a taxpayer must necessarily be taken into account in computing the taxpayer's profit in a reorganization. However, it does not follow that the amount of indebtedness assumed is taxable as profit at the time that the reorganization is effected; and it is significant that the usual practice of the Commissioner has been quite to the contrary.

The sections of the Act in question must be construed in view of the purposes which they were intended to effect. It is well known that the purpose was to provide for the exemption from taxation at the time of a business reorganization of the gains involved therein to the extent specified in the statute in order to remove impediments to corporate readjustments and also to prevent the recognition of fictitious gains or losses. The history of the legislation and the committee reports in Congress clearly manifest this legislative intention. C. H. Meade Coal Co. vs. Commissioner, 72 F. (2d) 22, 27–28; Minnesota Tea Co. vs. Commissioner, 76 F. (2d) 797, 802. Baar and Morris on Hidden Taxes & Corporate Reorganization, p. 244. The result is to defer the taxation of such gains until they are subsequently realized by the corporation grantor or its stockholders through the liquidation of the securities or property received.

So it was provided in effect that no gain should be recognized in the exchange of property solely for stock or securities in the transferee corporation; or if the property received in exchange should also include property or money other than stock or securities, the gain should be recognized only to the extent that such other property or money was not distributed in pursuance of the plan of reorganization. Now it seems to us, bearing in mind the general purpose of the statute, that it was not the intention of Congress to recognize for immediate taxation the gain derived in a corporate reorganization to the extent it should consist of an assumption of the debts of the corporate grantor. Such an assumption is undoubtedly an asset of value and may fairly be called property in the broad sense; but the money spent in the performance of the promise passes to creditors and does not come into the possession of the debtor corporation or its stockholders. It reduces the debts and therefore frees the assets from the claims of creditors so that they may be lawfully distributed amongst the stockholders or otherwise disposed of; but it does not increase in their hands the assets whose liquidation brings about the actual enjoyment of the realized profit. Therefore the recognition of the gain, to the extent of the amount of the debt assumed, would not serve the statutory purpose, but on the contrary would tend to

defeat it. It is a matter of common knowledge that a promise by the grantee to assume the debts of the grantor corporation is a customary incident of reorganization agreements, and where the transaction yields a profit to the grantor, taxable gain up to the amount of the assumed debt would accrue in the current year if the present contention of the Commissioner is correct, whether or not at that time the corporation or its stockholders had actually realized the profit in the transaction.

It seems obvious that Congress in referring to the receipt of stock or securities in Section 112 (b) (4) and to the receipt of money and other property in Section 112 (d) had in mind the sort of property that is susceptible of distribution among stockholders. Indeed, this is part of the argument of the Government which asserts that a distribution in reorganization generally contemplates a distribution among stockholders and that it would be a distortion of language to misconstrue the word "distribute" to mean the payment of creditors. But it does not follow, as the government contends, that when the taxpayer secures an assumption of its debts in addition to stock and securities or distributable property, it is not entitled to the exemption claimed. Congress has adopted the realistic conception that the substantial value which a corporation owns is the equity in its corporate property—that is, the value of its assets after provision has been made for the payment of its debts; that what the grantee acquires in a corporate reorganization is this equity, and that its assumption of liabilities is merely the means by which it is enabled to acquire a good title to the grantor's property. If this viewpoint is kept in mind, it is clear that the grantor in a reorganization agreement receives nothing from the assumption of its debts by the grantee that prevents it from claiming an exemption under either of the cited sections of the statute.

It must not be supposed that the gain derived by the corporate grantor from the assumption of its debts will entirely escape taxation through this construction of the Act. Manifestly the price paid for the corporate assets by the grantee includes both the value which passes to the corporation or its stockholders and that which passes to its creditors; and the entire profit will be recognized, when upon the ultimate liquidation of the assets actually received by the corporation or its stockholders a comparison is made between that which was originally put into the venture and that which has been finally taken out.

We have been referred to the decisions in Helvering vs. Minnesota Tea Co., 89 F. (2d) 711, and Liquidating Co. vs. Commissioner, 33 B. T. A. 1173, but insofar as they are at variance with the views herein expressed, we are constrained to disagree.

Affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1937

Supreme Court of the United States

Order allowing certiorari

Filed December 6, 1937

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, entered in the above-entitled cause on August 7, 1937.

OPINIONS BELOW

The opinion of the District Court (R. 169–189) is reported in 17 F. Supp. 558. The opinion of the Circuit Court of Appeals (R. 200–204) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 7, 1937. (R. 200.) The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The assets of the Hendler Company were transferred to the Borden Company in exchange for stock of Borden, cash, and Borden's undertaking to pay Hendler's debts. Does the payment and discharge by Borden of Hendler's bonded indebtedness result in taxable income to Hendler?

STATUTE INVOLVED

The pertinent provisions of the Revenue Act of 1928 appear in the Appendix, *infra*, pp. 13–15.

STATEMENT

During the spring of 1929, Hendler Creamery Company, Inc., a Maryland corporation engaged in the manufacture and distribution of ice cream, conducted various negotiations with The Borden Company, a New Jersey corporation, with a view to effecting a transfer of all its assets to the latter. An understanding between the parties was reached and embodied in a letter dated April 16, 1929. (R. 143–149.) That letter, however, was superseded by another agreement, dated May 21, 1929 (R. 3–22), and it was the latter agreement which formed the basis for the various transactions here under review (R. 22).

Pursuant to that agreement, Hendler, on June 21, 1929, transferred all its assets to Borden. (R.

151–155, 170.). In consideration therefor, Borden gave to Hendler 105,306[1] shares of its capital stock (out of a total of 3,256,993 shares) and $43,421.87 in cash, all of which Hendler immediately distributed to its stockholders. (R. 32, 35–36, 170.) In addition, Borden "assumed and agreed to pay" all the indebtedness and liabilities of Hendler, subject to certain exceptions not material here. (R. 9, 170.) Shortly thereafter, on June 25, 1929, Hendler changed its name to "Creameries, Incorporated" (R. 32), and was dissolved on August 5, 1930 (R. 35).

As a result of these transactions Hendler realized a profit of $6,608,713.65 (R. 172), most of which, however, the Government did not seek to tax by reason of the reorganization provisions of the revenue law. The present proceeding relates to a portion of that profit which the Government insists was not exempt from taxation.

The agreement provided that Borden would "assume and agree to pay all indebtedness and liabilities whatsoever of your [Hendler] Company" subject to certain exceptions not involved here (R. 9). The outstanding liabilities of Hendler as of June 21, 1929, which were assumed by Borden, consisted of current bank loans ($1,050,000), merchandise accounts ($130,410.78), and $501,000 par

[1] The stipulation (R. 32) declares the number to be 105,306, whereas the District Court's opinion fixes it at 106,306 (R. 170). Nothing, however, is made to turn upon this discrepancy.

value of bonds (R. 170). The present controversy relates merely to the assumption and discharge by Borden of Hendler's bonded indebtedness.

During the early part of the negotiations between Borden and Hendler, the latter had outstanding $675,000 principal amount of First Mortgage bonds (R. 4). These bonds were convertible into Prior Preference stock of Hendler, and by May 15, 1929, a number of the bonds had been so converted, leaving on that date bonds outstanding in the face amount of $501,000 (R. 21).

The bonds were subject to redemption on any interest payment date (interest being payable January 1 and July 1 of each year) on 30 days' notice at 107½% of their principal amount plus accrued interest (R. 4–5).

On May 15, 1929, the board of directors of Hendler voted to call and redeem all the outstanding bonds (R. 66–68), and on the same day notice of redemption was sent to the trustee under the bond indenture (R. 73). Thus the steps necessary to redeem the bonds were started nearly a week before the operative agreement of May 21, 1929, and more than a month before the transfer of assets on June 21, 1929.

Although, in the agreement of May 21, 1929, Borden "assumed" and "agreed to pay" the indebtedness of Hendler, it nowhere appears that any bondholder or other creditor consented to a release of Hendler from liability.

Pursuant to the agreement of May 21, 1929, Borden, on June 27, 1929, undertook to discharge Hendler's obligation on the $501,000 outstanding bonds. Up to June 27, 1929, Borden had acquired $156,000 of those bonds, and in a letter of that date, it instructed the trustee to cancel those bonds on July 1, 1929, without payment. (R. 86.) In the same letter it instructed the trustee to redeem the remaining $345,000 bonds on July 1, 1929, and stated that for that purpose it had deposited with the Guaranty Trust Company of New York the sum of $381,225[2] to the credit of the trustee. In all, Borden effected the discharge of Hendler liabilities by expenditure of $534,297.40 with respect to the bonded indebtedness. (R. 87, 170.)

In its return for 1929 Hendler did not include as taxable income this amount of $534,297.40, representing a discharge of liabilities, nor any part of the $6,608,713.65 profit realized on the exchange with Borden. The Commissioner did not object as to the bulk of the profit on the exchange, but took the position that the reorganization provisions did not exempt the item of $534,297.40. He made a deficiency assessment which was paid by L. Manuel Hendler, as transferee, on April 15, 1933, in the amount of $58,772.72, plus interest in the amount of $10,781.97. (R. 172.)

---

[2] Of that amount $345,000 was to be allocated to the face amount of the bonds, $25,875 to cover the premium of $7.50 per $100 bond, and $10,350 to cover accrued interest to July 1, 1929. (R. 86, 157.)

The present suit was filed July 11, 1934, to recover those amounts after a claim for refund had been denied. (R. 2.) The District Court held that the discharge of the taxpayer's bonded indebtedness was not taxable, and ordered a refund, after permitting an offset in the amount of $6,260.33, arising out of a different issue (R. 188–189), which is not now involved. The Circuit Court of Appeals affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding exempt under Section 112 of the Revenue Act of 1928 the income realized by Hendler Creamery Company as a result of the assumption and discharge by The Borden Company of the Hendler bonded indebtedness.

2. In affirming the decision of the District Court.

REASONS FOR GRANTING THE WRIT

Preliminary.—As a result of the exchange between the Hendler and Borden companies, Hendler realized an undisputed profit of $6,608,713.65. In particular that figure includes the amount of $534,297.40 which represents the assumption and discharge by Borden of Hendler's bonded indebtedness. That amount was properly included since it is clear that the payment of an obligation by another may be income to the one whose debt is discharged. *Douglas* v. *Willcuts*, 296 U. S. 1, 9; *Old*

Colony Tr. Co. v. *Commissioner*, 279 U. S. 716; *United States* v. *Boston & M. R. Co.*, 279 U. S. 732.[3]

Accordingly, if the reorganization provisions (Section 112) were absent from the law, the *entire* profit of $6,608,713.65, including the item of $534,297.40, would be subject to tax under the usual provisions of the statute taxing net income (Sections 21 and 22).[4] This apparently was not disputed by the court below, and the only question is whether Section 112 *exempts* income otherwise taxable under basic provisions in Sections 21 and 22.

There was, of course, a "reorganization" within the meaning of Section 112 i (1) (A), since there was an "acquisition by one corporation [Borden] of * * * substantially all the properties of another corporation [Hendler] * * *." See *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, and related cases. But Section 112 i (1) merely *defines* reorganization. The exemption from taxation must be found in the *operative* provisions of Section 112, and unless those operative provisions render the disputed income non-recognizable it

[3] Compare the administrative rulings of long standing to the effect that the assumption of a mortgage by a purchaser is the equivalent of money which the seller must include in the purchase price when computing gain. G. C. M. 2641, VI-2 Cumulative Bulletin 16; G. C. M. 4935, VII-2 Cumulative Bulletin 112.

[4] Cf. *United States* v. *Phellis*, 257 U. S. 156; *Rockefeller* v. *United States*, 257 U. S. 176; *Cullinan* v. *Walker*, 262 U. S. 134; *Marr* v. *United States*, 268 U. S. 536.

must be taxed under Sections 21 and 22 in the usual manner.

The only provisions in Section 112 that can possibly be invoked to grant the desired exemption are subsections (b) (4) and (d). However, since Borden's consideration for Hendler's assets included not only the assumption of the Hendler debts but also the payment of $43,421.87 in cash to Hendler, it is clear that subsection (b) (4) can have no application. That provision requires that the assets be exchanged "*solely* for stock or securities."

The remaining provision, subsection (d), grants an exemption in the following terms:

> If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—
>
> (1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but—
>
> (2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess

> of the sum of such money and the fair market value of such other property so received, which is not so distributed.

Under this subsection, the great bulk of the $6,608,713.65 profit was exempted. The Commissioner, however, insisted that nowhere in that subsection could there be found any exemption applicable to the item of $534,297.40.

The District Court, after a lengthy analysis (R. 175–177), held that the assumption and discharge of Hendler's bonded indebtedness was not "other property or money" within the meaning of subsection (d). But in spite of that ruling (which would seem to render subsection (d) inapplicable to this controversy and thereby eliminate at once the exemption which is claimed thereunder), the District Court held the item exempt. Although the Circuit Court of Appeals appeared to consider the question whether the disputed item was "other property or money" within subsection (d), it is not entirely clear from its opinion which conclusion is reached.

This item either was or was not "other property or money" within the meaning of subsection (d). But whichever it was, the exemption claimed by respondent does not flow therefrom.

There are, therefore, two reasons for the granting of the writ, one based upon the assumption that the disputed item did not represent "other property or money" and the other based upon the assumption that it did.

Reasons for Granting the Writ.—1. Assuming that the assumption and discharge of Hendler's bonded indebtedness did constitute "other property or money", the claimed exemption follows only if it can be regarded as having been "*distribute*[d] * * * in pursuance of the plan of reorganization." And what constitutes a "distribution" within the meaning of subsection (d) is directly in issue in *Helvering* v. *Minnesota Tea Co.*, 89 F. (2d) 711 (C. C. A. 8th), No. 106, 1937 Term, in which this Court, on October 11, 1937, granted certiorari. In that case a corporation had exchanged its assets, pursuant to a reorganization plan, for stock of the transferee and for cash which it immediately transferred to its stockholders upon condition that they assume its debts. The Circuit Court of Appeals for the Eighth Circuit ruled, (pp. 714–715), that there was no genuine "distribution" to stockholders within the meaning of Section 112 (d) and that the transaction constituted a circuitous retention and application of the money, to the advantage of the transferor company. *A fortiori,* there can be no "distribution" in the instant case, where there was not even in form a distribution to the stockholders.

The Government's brief in opposition to the petition in the *Minnesota Tea Co.* case was filed prior to the decision of the court below, and attempted to distinguish the District Court opinion in the instant case as based on the view that no "other

property or money" had been received by the transferee corporation (Br. p. 9). If the Court of Appeals has ruled that "other property or money" was received, the conflict with the *Minnesota Tea Co.* case becomes clear.

The court below apparently recognized that its decision was contrary to that of the Circuit Court of Appeals for the Eighth Circuit, for it declared (R. 204):

> We have been referred to the decisions in *Helvering* vs. *Minnesota Tea Co.*, 89 F. (2d) 711 and *Liquidating Co.* vs. *Commissioner*, 33 B. T. A. 1173, but insofar as they are at variance with the views herein expressed, we are constrained to disagree.

The decision is also in conflict with an alternative ground of decision in *West Texas Refining & D. Co.* v. *Commissioner*, 68 F. (2d) 77, 80 (C. C. A. 10th). A corporation exchanged its assets for stock in the transferee and cash. The transferor used the cash to pay its debts. The court held that gain could be taxed to the transferor to the extent of the cash received. If, as was held in that case, a payment of its debts by the transferor does not constitute an exempt "distribution," neither does an assumption of its liabilities by the transferee.

In view of the conflict, and in any event in view of the fact that this case presents questions cognate to those which the Court will consider in the *Minnesota Tea Co.* case, we submit that the petition should be granted.

2. Upon the assumption that the item of $534,297.40 did not constitute "other property or money", the decision of the Circuit Court of Appeals plainly calls for review. For, subsection (d) undertakes to deal *only* with the situation where there has been a receipt of "other property or money." And if this item was not "other property or money" subsection (d) can have no operative effect whatever, thereby leaving this item to be dealt with under Sections 21 and 22, as though Section 112 were not part of the law at all.

If this item is not "other property or money", the granting of an exemption by the court below, merely upon the general atmosphere of a reorganization rather than upon the basis of a specific provision authorizing the exemption, is so extraordinary a departure from the terms of the statute as to call for review.

CONCLUSION

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

NOVEMBER 1937.

APPENDIX

Revenue Act of 1928, c. 852; 45 Stat. 791:

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(*a*) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) SAME [STOCK FOR STOCK ON REORGANIZATION]—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganiza-

tion, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(d) *Same [Gain from exchanges not solely in kind]—gain of corporation.*—If an exchange would be within the provisions of subsection ~~(b)~~ (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets

to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 563

UNITED STATES OF AMERICA, PETITIONER

v.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.)

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 169–189) is reported in 17 F. Supp. 558. The opinion of the Circuit Court of Appeals (R. 200–204) is reported in 91 F. (2d) 680.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 7, 1937. (R. 200.) The petition for a writ of certiorari was filed November 6, 1937, and was granted January 17, 1938. The juris-

diction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether income realized in a statutory reorganization by the transferor corporation as a result of the assumption and discharge of its bonded indebtedness by the transferee corporation is exempt from taxation under Section 112 (d) of the Revenue Act of 1928 as "other property or money" received which the transferor corporation "distributes" in pursuance of the plan of reorganization.

STATUTE INVOLVED

The statute involved will be found in the Appendix, *infra,* pp. 17–19.

STATEMENT

The facts as stipulated (R. 31–150) and as found in the opinion of the District Court (R. 169–189) are as follows:

On June 21, 1929, Hendler Creamery Company, Inc., a Maryland corporation, transferred all its assets to The Borden Company, a New Jersey corporation. (R. 151–155, 170.) In exchange for those assets, Borden, pursuant to an agreement dated May 21, 1929, gave to Hendler 105,306[1]

[1] The stipulation (R. 32) declares the number to be 105,306, whereas the District Court's opinion fixes it at 106,306 (R. 170). Nothing, however, is made to turn upon this discrepancy.

shares of Borden stock (there being 3,256,993 shares outstanding) and $43,421.87 in cash, all of which Hendler immediately distributed to its stockholders. (R. 32, 35–36, 170.) In addition, Borden "assumed and agreed to pay" all the indebtedness and liabilities of Hendler, subject to certain exceptions not material here. (R. 9, 170.) Shortly thereafter, on June 25, 1929, Hendler changed its name to "Creameries, Incorporated" (R. 32), and was dissolved on August 5, 1930 (R. 35).

As a result of these transactions Hendler realized a profit of $6,608,713.65 (R. 172), most of which the Government did not seek to tax by reason of the reorganization provisions of the revenue law. The Government did, however, insist that of that profit, $534,297.40 was taxable, since that amount represented the expenditure by Borden to discharge Hendler's bonded indebtedness and was not relieved of tax by the reorganization provisions. The facts with respect to that item, in greater detail, are as follows:

On May 15, 1929, Hendler had an outstanding bonded indebtedness in the aggregate face amount of $501,000. (R. 21.) The bonds were subject to redemption on any interest payment date (interest being payable on January 1 and July 1 of each year) on 30 days' notice at 107½% of their principal amount plus accrued interest. (R. 4–5.) On May 15, 1929, the board of directors of Hendler voted to call and redeem all the outstanding bonds

(R. 66–68), and on the same day notice of redemption was sent to the trustee under the bond indenture (R. 73). Thus the steps necessary to redeem the bonds were started nearly a week before the operative agreement of May 21, 1929, and more than a month before the transfer of assets on June 21, 1929.

After the transfer of assets to Borden, and pursuant to the agreement of May 21, 1929, Borden, on June 27, 1929, undertook to discharge Hendler's obligation on the $501,000 outstanding bonds. Up to June 27, 1929, Borden had acquired $156,000 of those bonds, and in a letter of that date, it instructed the trustee to cancel those bonds on July 1, 1929, without payment. (R. 86.) In the same letter it instructed the trustee to redeem the remaining $345,000 bonds on July 1, 1929, and stated that for that purpose it had deposited with the Guaranty Trust Company of New York the sum of $381,225[2] to the credit of the trustee. In all, Borden effected the discharge of Hendler liabilities by expenditure of $534,297.40 with respect to the bonded indebtedness.[3] (R. 87, 170.)

---

[2] Of that amount $345,000 was to be allocated to the face amount of the bonds, $25,875 to cover the premium of $7.50 per $100 bond, and $10,350 to cover accrued interest to July 1, 1929. (R. 86, 157.)

[3] As of the date of the transfer of assets to Borden (June 21, 1929), other outstanding liabilities of Hendler which were "assumed" by Borden were current bank loans ($1,050,000) and merchandise accounts ($130,410.78). (R. 170.) These items, however, are not involved in this controversy.

In its return for 1929 Hendler did not include as taxable income this amount of $534,297.40, representing the discharge of liabilities, nor any other part of the $6,608,713.65 profit realized on the exchange with Borden. The Commissioner did not object as to the bulk of the profit on the exchange, but took the position that the reorganization provisions did not exempt the item of $534,297.40. He made a deficiency assessment which was paid by L. Manuel Hendler, as transferee, on April 15, 1933, in the amount of $58,772.72, plus interest in the amount of $10,781.97. (R. 171–172.)

The present suit was filed July 11, 1934, to recover those amounts after a claim for refund had been denied. (R. 2.) The District Court held that the discharge of the taxpayer's bonded indebtedness was not taxable, and ordered a refund, after permitting an offset in the amount of $6,260.33, arising out of a different issue (R. 188–189), which is not now involved. The Circuit Court of Appeals affirmed.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding exempt under Section 112 of the Revenue Act of 1928 the income realized by Hendler Creamery Company as a result of the assumption and discharge by The Borden Company of the Hendler bonded indebtedness.

2. In affirming the decision of the District Court.

SUMMARY OF ARGUMENT

A

The exchange between Hendler and Borden resulted in realized profit of $6,608,713.65, which would normally be subject to tax under Sections 13, 21, and 22 of the Revenue Act of 1928 were it not for the reorganization provisions in Section 112. That profit includes $534,297.40, which represents the assumption and discharge by Borden of Hendler's bonded indebtedness. It is our position that while Section 112 relieves most of the $6,608,713.65 of tax, the item of $534,297.40 is nowhere exempted.

The provisions which respondent contends are effective to exempt the $534,297.40 are contained in subsection (d) of Section 112. Those provisions offer an exemption where the transferor corporation receives, in addition to stock or securities of the transferee, "other property or money" which it "distributes" in pursuance of the plan of reorganization.

The recent decision of this Court in *Minnesota Tea Co.* v. *Helvering*, No. 106, present Term, is, we submit, controlling here. That case held, *inter alia*, that the "distribution" necessary to come within the exemption clause must be a distribution to stockholders. Plainly, there was no such distribution of the $534,297.40 income in this case. Even if Hendler had received this amount in cash

from Borden and had then paid its bondholders, it is clear from the *Minnesota Tea Co.* decision that this item would not be exempt. The same result follows *a fortiori* here, where Hendler merely instructed Borden in advance to apply that amount directly to the payment of Hendler's bonded indebtedness. Indeed, the very nature of this income—the discharge of the taxpayer's obligations—renders it incapable of distribution at all. A contrary conclusion in the present case would operate to give Hendler a permanent exemption from taxation of this income rather than a mere postponement of tax, which is all that the reorganization provisions were intended to accomplish.

B

The District Court held that the item of income involved herein was not "other property or money" within the meaning of subsection (d) of Section 112, and from that holding it concluded that this item was exempt. The Circuit Court of Appeals, without specifically so stating, appeared to adopt the same chain of reasoning. We may assume, *arguendo,* the correctness of the preliminary holding that this item of income was not "other property or money" within the meaning of subsection (d). But an exemption does not follow from that determination. That determination would merely mean that, as this item is neither "stock or securities" nor "other property or money," it is not dealt

with at all in subsection (d), that the exemption granted by subsection (d) does not here apply, and that subsection (d) has no operative effect whatever with respect to this controversy. The result would be that this item of income would have to be treated as though Section 112 were entirely absent from the law—i. e., the item would simply remain to be dealt with under Sections 13, 21, and 22, which plainly impose the challenged tax.

ARGUMENT

THE ASSUMPTION AND DISCHARGE OF HENDLER'S BONDED INDEBTEDNESS BY BORDEN CONSTITUTED INCOME TO HENDLER, AND THERE IS NO PROVISION IN THE STATUTE THAT EXEMPTS THAT INCOME FROM TAXATION

A

As a result of the exchange between the Hendler and Borden companies, Hendler realized profit of $6,608,713.65. In particular, that figure includes the amount of $534,297.40, which represents the assumption and discharge by Borden of Hendler's bonded indebtedness. That amount was properly included in computing the profit, since it is clear that the payment of an obligation by another may be income to the one whose debt is discharged. *Douglas* v. *Willcuts*, 296 U. S. 1, 9; *Old Colony Tr. Co.* v. *Commissioner*, 279 U. S. 716; *United States* v. *Boston & M. R. Co.*, 279 U. S. 732.[4]

[4] Compare the administrative rulings of long standing to the effect that the assumption of a mortgage by a purchaser is the equivalent of money which the seller must include in

Accordingly, if the reorganization provisions (Section 112) were absent from the law, the *entire* profit of $6,608,713.65, including the item of $534,297.40, would be subject to tax under the usual provisions of the statute taxing net income (Sections 13, 21, and 22).[5] This apparently was not disputed by the court below, and the only question is whether Section 112 *exempts* income otherwise taxable under the basic provisions in Sections 13, 21, and 22.

There was, of course, a "reorganization" within the meaning of Section 112 i (1) (A), since there was an "acquisition by one corporation [Borden] of * * * substantially all the properties of another corporation [Hendler] * * *."[6] But Section 112 i (1) merely *defines* reorganization.

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the purchase price when computing gain. G. C. M. 2641, VI–2 Cumulative Bulletin 16; G. C. M. 4935, VII–2 Cumulative Bulletin 112.

See also *Gold & Stock Telegraph Co.* v. *Commissioner*, 83 F. (2d) 465 (C. C. A. 2d), certiorari denied, 299 U. S. 564; *Ossorio* v. *United States*, 18 F. Supp. 959 (C. Cls.), certiorari denied, October 11, 1937, No. 223, present Term; *Houston Belt & Terminal Ry. Co.* v. *United States*, 250 Fed. 1 (C. C. A. 5th); *United States* v. *Mahoning Coal R. R. Co.*, 51 F. (2d) 208 (C. C. A. 6th), certiorari denied, 285 U. S. 559.

[5] Cf. *United States* v. *Phellis*, 257 U. S. 156; *Rockefeller* v. *United States*, 257 U. S. 176; *Cullinan* v. *Walker*, 262 U. S. 134; *Marr* v. *United States*, 268 U. S. 536.

[6] See *Helvering* v. *Minnesota Tea Co.*, 296 U. S. 378, and related cases decided therewith.

The exemption from taxation must be found in the *operative* provisions of Section 112, and unless those operative provisions render the disputed income non-recognizable it must be taxed under Sections 13, 21, and 22 in the usual manner.

The only provisions in Section 112 that can possibly be invoked to grant the desired exemption are subsections (b) (4) and (d), *infra*, p. 18.

Subsection (b) (4) allows non-recognition of realized income only where the assets are exchanged "*solely* for stock or securities." [Italics supplied.] Since Borden's consideration for Hendler's assets included not only the assumption of the Hendler debts but also the payment of $43,421.87 in cash to Hendler, it is clear that subsection (b) (4) can have no application.

The remaining provision, subsection (d), permits non-recognition in the following terms:

> If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—
>
> (1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

> (2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

Under this subsection, the great bulk of the $6,608,713.65 profit was exempted. We contend, however, that the item of $534,297.40 is not relieved of tax by subsection (d), and that this case is ruled by *Minnesota Tea Co.* v. *Helvering,* No. 106, present Term, decided January 17, 1938.

There, this Court held that the "distribution" contemplated in subsection (d) is "a distribution to stockholders, and not payment to creditors." Accordingly, it concluded that the circuitous payment by a corporation to creditors by furnishing money for that purpose to its stockholders was not a distribution within the meaning of the exemption provisions.

The instant case follows *a fortiori* from that decision. In that case there was at least an actual transfer of funds to stockholders. Here there was not even the form of a distribution to stockholders. Borden in the first instance effected a discharge of Hendler's bonded indebtedness. If Borden had, instead, given the money directly to Hendler, and if Hendler itself had then paid the bondholders, it is plain that this income would not have been

exempt under subsection (d). *Minnesota Tea Co. v. Helvering, supra.* In neither situation could it be even remotely contended that there is a distribution to stockholders. Indeed, since the $534,297.40 income herein arises, not from the actual receipt of cash by Hendler, but rather from the assumption and discharge of the indebtedness (sometimes referred to as constructive receipt), it is difficult to see how there could be any "distribution" of that income to anyone under the facts of the present case.

The underlying purpose of the reorganization provisions clearly requires that respondent's claim of exemption be rejected. While those provisions were meant to facilitate the readjustment of corporate structure by easing the tax burden, they were plainly intended at most to postpone the incidence of the tax. Thus, recognition of the gain on receipt of securities is deferred until their ultimate disposition. There was no intention whatever to grant a permanent exemption. See H. Rep. No. 179, 68th Cong., 1st Sess., pp. 16–17; S. Rep. No. 398, 68th Cong., 1st Sess., pp. 18–19.[7] In the case of money received by the corporation as part of the original exchange, the gain is taxable immediately to that extent, either to the corporation or, if the cash is distributed to the stockholders pur-

[7] These reports were made with respect to the bill that became the Revenue Act of 1924, which contained for the first time the provisions of law involved herein.

suant to the plan, then to the stockholders. H. Rep. No. 179; *supra*, pp. 14–15; S. Rep. No. 398, *supra*, pp. 18–19. Where the corporation employs the money to pay its debts, or directs in advance that it be applied to the payment of such debts, the income would *pro tanto* escape taxation altogether if the exemption granted by the reorganization provisions were to be held applicable. Accordingly, the basic philosophy underlying the reorganization provisions confirms and fortifies the result which the recent decision in the *Minnesota Tea Co.* case compels here.[8]

B

The District Court, after extended discussion, concluded (R. 175–177) that the assumption and discharge of Hendler's bonded indebtedness was not "other property or money" within the meaning of subsection (d). The Circuit Court of Appeals,

[8] The District Court asserted that the Government's position herein is "contrary to the administrative practice for more than ten years" (R. 175), and the Circuit Court of Appeals made a somewhat similar statement about the "usual practice of the Commissioner" (R. 203). Those assertions are wholly unsupported by any published rulings, either official or unofficial. Moreover, even published rulings, where not officially approved by the Secretary of the Treasury, are of little aid in construing the statute, and certainly cannot be deemed to have been brought to the attention of Congress so as to enjoy the presumption of legislative approval upon the reenactment of the Act. See *Helvering* v. *N. Y. Trust Co.*, 292 U. S. 455, 467–468; *Biddle* v. *Commissioner*, No. 55, present Term, decided January 10, 1938.

while not specifically so stating, likewise seemed to treat this item as not being "other property or money". (R. 204.)

We may assume, *arguendo,* that both the lower courts were correct in excluding this item of income from the phrase "other property or money".[9] The error of both courts is the conclusion that therefore subsection (d) grants an exemption. We contend that exactly the opposite result flows from subsection (d).

In order to bring into play the exemption contained in subsection (d), two things are necessary. First, there must be a receipt (in addition to stock or securities) of "other property or money"; and second, such "other property or money" must be "distributed" in pursuance of the plan of reorganization. These conditions are in the conjunctive,

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[9] While we accept that result for the purpose of argument, its correctness seems open to serious question. Subsection (b) (4) deals with exchanges "solely" for stock or securities. Subsection (d) deals with exchanges that are not solely for stock or securities; it undertakes to deal with exchanges that would be within subsection (b) (4) were it not for the fact that the property received in the exchange consists not merely of stock or securities but also of "other property or money". It would seem from the broad sweep of this language that Congress intended subsections (b) (4) and (d) to exhaust the totality of transfers in which stock or securities are received either as the sole or as part consideration for the exchange, and that therefore the phrase "other property or money" was meant to embrace all the consideration for the exchange other than stock or securities.

and the exemption sought under subsection (d) must be denied if either of them is not complied with. And we have endeavored to show, *supra*, pp. 11–13, that there was not a "distribution" within the meaning of subsection (d). That alone is sufficient to defeat the exemption.

But, if this item of income is not "other property or money", the claim for exemption must fail on that account, as well. For, subsection (d) is applicable only to the extent that it involves "other property or money". If this item of income is not "other property or money", then subsection (d) has no operative effect whatever, and the exemption sought thereunder must of necessity be denied. In short, if the assumption and discharge of Hendler's bonded indebtedness does not constitute the receipt of "other property or money" within the meaning of subsection (d), then *first*, the exemption granted by subsection (d) can have no application here, and *second*, the case is reduced to the situation that would exist if Section 112 were entirely absent from the statute. That situation calls merely for the determination of whether this item is taxable income under Sections 13, 21, and 22; and as we have pointed out, *supra*, pp. 8–9, it plainly is taxable income to Hendler whether denominated "constructive receipt" or described by any other label.

CONCLUSION

The judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

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ARNOLD RAUM,
Special Assistants to the Attorney General.

FEBRUARY, 1938.

APPENDIX

Revenue Act of 1928, c. 852, 45 Stat. 791:

SEC. 13. TAX ON CORPORATIONS.

(a) *Rate of tax.*—There shall be levied, collected, and paid for each taxable year upon the net income of every corporation, a tax of 12 per centum of the amount of the net income in excess of the credits against net income provided in section 26.

* * * * *

SEC. 21. NET INCOME.

"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

SEC. 22. GROSS INCOME.

(a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

* * * * *

SEC. 112. RECOGNITION OF GAIN OR LOSS.

(a) *General rule.*—Upon the sale or exchange of property the entire amount of the gain or loss, determined under section 111, shall be recognized, except as hereinafter provided in this section.

(b) *Exchanges solely in kind.*—

* * * * *

(4) SAME [STOCK FOR STOCK ON REORGANIZATION]—GAIN OF CORPORATION.—No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

* * * * *

(d) *Same [Gain from exchanges not solely in kind]—gain of corporation.*—If an exchange would be within the provisions of subsection (b) (4) of this section if it were not for the fact that the property received in exchange consists not only of stock or securities permitted by such paragraph to be received without the recognition of gain, but also of other property or money, then—

(1) If the corporation receiving such other property or money distributes it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

(2) If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property so received, which is not so distributed.

* * * * *

(i) *Definition of reorganization.*—As used in this section and sections 113 and 115—

(1) The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least

a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1950

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 563.

UNITED STATES OF AMERICA, PETITIONER,

v.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC. (FORMERLY HENDLER CREAMERY CO., INC.)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

MEMORANDUM OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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In the notice served on Respondent of the filing of the above petition, it is stated "no brief in support will be filed".

Respondent, therefore, likewise refrains from filing a brief.

So far as concerns "the reasons for granting the Writ" set out on page 10 of the Petition, Respondent

respectfully submits that a comparison of the cases cited with the instant case will clearly demonstrate that there is in fact no conflict between the *decisions* in the respective cases, that no ground for granting the Writ therefore really exists, and that the conclusions reached by each of the Courts below which has fully considered the case do not in fact call for or require a further review.

Respectfully submitted,

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Attorneys for Respondent.

November, 1937.

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BRIEF FOR THE RESPONDENT.

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WILLIAM R. SEMANS,
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CITATIONS.

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L. MANUEL HENDLER, As Transferee of Creameries, Inc., (Formerly Hendler Creamery Co., Inc.),

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

The opinion of the District Court (R. 169-189) is reported in 17 F. Supp. 558. The opinion of the Circuit Court of Appeals (R. 200-204) is reported in 91 F. (2d) 680.

JURISDICTION.

The judgment of the Circuit Court of Appeals, affirming the judgment below, was entered August 7, 1937 (R. 200).

The petition for a writ of certiorari was filed November 6, 1937, and was granted December 6, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether in a statutory reorganization under Section 112 of the Revenue Act of 1928 the assumption of liabilities (debts and contracts) of the transferor corporation by the transferee corporation constitutes *recognizable* taxable gain to the transferor?

STATUTE INVOLVED.

The pertinent provisions of the Revenue Act of 1928 appear in the Appendix to Petitioner's Brief, pp. 17-19.

STATEMENT.

While Respondent is mindful of the rule forbidding repetition in its brief of facts already set out in Petitioner's, the "statement" there made very inadequately covers the important facts and therefore conveys an erroneous impression as to the *reason* both for the early payment of the bonded indebtedness there referred to, and the method followed in accomplishing this. The Commissioner, as the record shows, treated and assessed *only this item* as "recognizable gain" to Hendler in the transaction, on a theory quite different, as will be later shown, from either that advanced by counsel in the District Court, or the still different one advanced in the Circuit Court of Appeals by the new counsel there appear-

ing. Inasmuch as the brief for Petitioner in *this* Court seems to put forward, notwithstanding their inconsistency, all three of these successively advanced theories, it is necessary for Respondent at least to supplement Petitioner's "statement of facts" to the extent necessary to demonstrate that the *Commissioner's* theory, at least, is not supported by the facts, and that unless one or other of the *subsequently* advanced theories is sound,—that *all* obligations assumed constitute "recognizable gain",—then *this* item of "bonded debt" stands on no different footing from the other "assumed debts", of more than twice that amount.

Petitioner's "statement" says nothing of the highly significant fact that the "bonded debt" therein referred to constituted less than one-third part of the total obligations of Hendler assumed by Borden. Not only were Hendler's contracts, leases, etc., all assumed, but over $1,050,000 of current bank loans, $130,410.78 of merchandise accounts, and in fact all liabilities of the Hendler business, whether matured or contingent, as of the day of transfer, were also included in the obligations so assumed (R. 154, 156). Moreover, the statement emphasizes (Petitioner's brief, p. 3) that Hendler directors "called" the bonds on May 15th, 1929, "nearly a week before the operative agreement of May 21, 1929, (brief p. 4),—manifestly implying that *Hendler* therefore made the *bond* payment a *special* requirement. But in fact the *formal* agreement of May 21, 1929, had been preceded by one of similar tenor dated April 16, 1929, executed by Borden (R. 143), so that the *May* agreement was the mere formal execution by the two companies of one to which the controlling stockholders of Hendler had already also bound Hendler (R. 149).

Petitioner's brief and argument also imply, though do not assert, that (brief, bottom p. 11) the method might equally well have been followed of Borden "giving the money directly to Hendler and Hendler itself paying the bondholders"—in other words, that this was a mere plan used here as in the Minnesota Tea Co. case (No. 106, present term), of adopting a mere *form* in order to avoid a tax. As will be shown, none of these intimations has any real basis in fact.

The Commissioner's theory in assessing as taxable gain this item of bonded debt alone while not so treating the assumption of the other money debts of over $1,180,400 was, as he states in his letter of March 26, 1934 (R. 123), that this item was "constructively received."

Here it should be noted that Petitioner is in error in its brief (p. 12) in stating that "assumption of indebtedness is sometimes referred to as constructive receipt." Neither the Commissioner nor counsel for the Government in the District Court meant *mere assumption,*—they meant that *this particular bond money was so paid over as in effect to have gone to Hendler direct.* The Commissioner never even suggested that the *other* debts which were likewise assumed and discharged constituted "constructive receipt", of cash to that amount, by Hendler.

Evidently the thought was that because the bonds were paid so soon (July 1, 1929) after the date of closing (June 21, 1929) there was some special requirement on Hendler's part that these be paid on that date, and that it was practically Borden paying Hendler and then the latter itself paying the bonds. While Government counsel in the District Court evidently placed no reliance on this theory (it was practically abandoned alto-

gether by counsel in the Circuit Court of Appeals), in the Government's brief in the District Court the Commissioner's thought is expressed as follows:

> "The liquidation of the bonds of Creameries, Inc. (Hendler) by the Borden Co. was a separate, distinct and essential part of the consideration for the conveyance of the assets of said Creameries, Inc."

No attempt was made, however, either in the brief or otherwise, to sustain this assertion by reference to the *facts* in evidence. On the contrary, the facts show directly the contrary,—it was not Hendler but *Borden* who required that any "bonded" debt be eliminated at as early date as possible, and this could be done, in accordance with the provisions whereby the Hendler bonds were callable, *only at the first interest date* (Jan. and July) and after thirty days' notice (R. 4-5). The Borden Company's "capital structure consisted only of common stock and the Company had no funded debt" (sixth line from bottom p. 150 of R.). Manifestly, therefore, it was unwilling to carry among its obligations a *bonded* or *mortgage* debt, which in its "financial statement" would have to be shown as a lien against part of its assets acquired from Hendler. If not "called" thirty days before July 1, 1929, this "funded debt" could not be called or retired before January 1, 1930. Hence *Borden* (*not* Hendler) made as a condition of Borden's offer,—as one of the *considerations passing to Borden,* not *Hendler,*—that these bonds should be called in time to enable Borden to retire them July 1, 1929. In the preliminary offer of April 16, 1929 (R. 143) made by Borden to Hendler and accepted by Hendler controlling stockholders on April 16th (R. 149), it is expressly stated (R. 146), that:

> "It is a condition of our obligation hereunder that the said First Mortgage Bonds and Prior Preference Stock be called for redemption on July 1, 1929."

And both the preliminary (R. 146) and the final agreement (R. 12) required that the "call" be made not later than May 21, 1929. As the real contract had already been made on April 16, 1929, the directors issued the required call on May 15,—a month after, rather than "a week before", the date of the *real* binding agreement.

The formal agreement of May 21, 1929, provided for the closing of the transfer on June 21, 1929 (R. 19),—but contemplated the possibility, always present in such a transaction, of delay and consequent adjournments being necessitated by arising of unexpected obstacles (R. 19). However, the bonds, after being "called" for July 1, 1929, would have to be *paid* that day, regardless of this delay. Hence the agreement further provided,—*not* that *Borden* in that event would provide Hendler the money to pay the bonds, but that Hendler might borrow the necessary amount and add this (R. 10, 177-178) to the indebtedness shown on the balance sheet of December 31, 1928, representing the debts to be "assumed" by Borden (R. 9, 178), and which debts were not except in this event to be increased otherwise than by usual indebtedness incurred in the ordinary course of business. Not only did Borden not agree in that event to supply, loan or advance the money, but it did not agree even to reimburse Hendler.

It merely agreed that if necessary delays occurred beyond June 21, 1929, and if consequently Hendler, having "called" the bonds, had been compelled to borrow money for that purpose, and thus convert this "funded debt" into an ordinary bank debt (like the other $1,050,000 shown on the balance sheet of December 31, 1928), then *if* and when the transaction later went through, instead of Borden taking subject to the original *bond* debt, it would take subject to and assume a correspondingly in-

creased bank indebtedness owing by Hendler, Hendler to furnish a "satisfaction piece" showing that the mortgage had in fact been released and the *bond* debt lien discharged (R. 12, 178). Nor, in that event, was there any agreement as to the *time* when Borden should pay this additional money thus borrowed by Hendler. It would be, thereafter, in precisely the same status as the original bank indebtedness, as to which there was *no* agreement as to the *time* when Borden should pay this,—merely that Borden *assumed it.*

So far from it being a special consideration moving to *Hendler* that this provision should be included in the contract submitted by Borden, it would have been manifestly more advantageous to Hendler to have had *no* call of the bonds made until after Borden actually consummated the transaction. Under the contract as proposed by Borden, Hendler took the risk after issuing the call, not merely of a delay and of having *itself* to finance the meeting of the call, but of the very real possibility that the *Borden transaction might never go through at all.*

The requirement, as the agreements thus make clear, was one imposed by *Borden,* that the "bonded debt" should be changed into one *not* of that character, constituting a lien on the property.

Not only, as has been shown, was the purpose of providing for payment on July 1st of the bonded debt to *change the character* of this indebtedness, and the requirement that of *Borden* and not of Hendler, but the *method* followed in the payment of this bond debt is the only one which could have been followed. As has been said, the Petitioner's counsel in their brief here imply that the transaction could equally well have been handled by Borden paying to Hendler, and Hendler then itself discharging

its bonded debt, and that the only motive for adopting the "assumption" method was to avoid the technical "receipt" by Hendler of this money. Upon consideration, however, it will become clearly apparent that this is not the case. The transaction could not have been handled in any other way. This is a totally different situation from that presented in the recent Minnesota Tea case, *supra,* where the money *actually received* by the transferor, with which to pay its debts, was *primarily* "distributed" by it directly to its *stockholders,* who *then* paid these debts,—not only an available but a much simpler method evidently being for the Company to pay its debts direct. Here Borden *at no time could have paid the "bond money" to Hendler direct,* with protection to Borden. If the transfer went through (as it did) on the day set, June 21st, Borden would have taken over the property subject to this still unreleased mortgage, which it could *not* get released unless the necessary amount was paid to *the trustee under the mortgage.* The same situation would have existed had the matter been closed July 1st. If, on the other hand, still further delays occurred (as it was realized was quite possible), Borden could not safely *pay Hendler* the money with which to meet the July 1st call, thus performing in anticipation the "assumption" which it agreed to perform *only if the merger went through,*—because the obstacles which caused the delays might *never* be overcome. Hence *Borden,* if it was unwilling to take such risks, could handle the "bond debt" in no other way. As has also been shown, instead of payment on July 1, 1929, of the bond debt being a *requirement by Hendler,* Hendler was no more interested in the special *time* at which such was paid than in the *time* of payment of the much larger *bank* indebtedness, and it was *Borden's* requirement that the debt

be changed from the character of a *funded* one. Indeed, as the bonds would not have matured *unless called*, it was really a disadvantage to *Hendler* thus to mature them. Hence neither in fact nor in principle was there any distinction between "assumption of the bonded debt" and "assumption of all other debts" of Hendler, and therefore unless (which will now be discussed) the Petitioner's counsel are right in their contention that *all* obligations "assumed" constitute in a reorganization "taxable income" to the transferor, no justification existed or exists for taxing as income *this item alone*, as involving some special and peculiar feature making it taxable.

THE LAW OF THE CASE.

The opinions filed in both the District Court (R. 169) and the Circuit Court of Appeals (R. 200) so fully cover the questions here involved that Respondent can add little to but at most can emphasize the reasoning which led both Courts to the conclusion here assailed by the Petitioner as incorrect. While Judge Chesnut expressed the view (R. 184) that if the distribution is made pursuant to the plan of reorganization it is immaterial under the statute whether this is to stockholders or to creditors, his conclusion in no way depended upon this point. As he himself says (R. 186):

> "But finally on this point it is to be observed that this is really not the crucial point in this particular case, because neither in form nor in substance, did Hendler receive any money or property which was not distributed to stockholders. As to form, the money used to pay the bonded debt was never actually received or distributed, or retained by the corporation; and as to substance, all that Hendler received in the transaction (other than a comparatively small amount of cash distributed to preferred

> stockholders) was common stock of Borden, representing the equity in its property, in exchange for the equity in Hendler property. The item of $534,297.40 was not taxable."

The Circuit Court of Appeals even impliedly holds (R. 204) that the distribution meant is that *to stockholders,* yet reaches the same conclusion as Judge Chesnut. The crucial question, as both Courts agree, is whether the statute either in fact provides or was intended to provide that the mere assumption of transferor's liabilities in a merger of this kind shall entail liability for "profit" tax upon the transferor corporation.

Petitioner's counsel in their brief cite various authorities in support of the proposition that in a *sale* the assumption and payment by the purchaser of a debt resting on the property, and owing by the seller, is part of the consideration received by seller, and to be taken into account in computing the seller's taxable "gain or profit". Respondent has never at any time questioned *that* proposition. If Hendler had merely made an ordinary *sale* of its assets to Borden, the assumption by Borden of a debt owing by Hendler, constituting a *lien* on such assets, would admittedly have been part of the consideration,—of the purchase price.

We are not dealing here with a *sale,* however, but with a *statutory reorganization,* as defined in a statute the very purpose of which was to make "non-recognizable" in such a case gain which in a *sale* would have been taxable income.

Both of the Courts below were clearly of the opinion that the assumption of liabilities in a *reorganization,* as defined by Section 112(i) (1) of the Revenue Act of

1928, was not intended to, and did not, subject the transferor corporation to a tax thereon (R. 175, 203).

"The sections of the Act in question must be construed in view of the purposes which they were intended to effect. It is well known that the purpose was to provide for the exemption from taxation at the time of a business reorganization of the gains involved therein to the extent specified in the statute in order to remove impediments to corporate readjustments and also to prevent the recognition of fictitious gains or losses. The history of the legislation and the committee reports in Congress clearly manifest this legislative intention. C. H. Mead Coal Co. v. Commissioner, 72 F. (2d) 22, 27-28; Minnesota Tea Co. v. Commissioner, 76 F. (2d) 797, 802. Baar and Morris on Hidden Taxes & Corporate Reorganization, p. 244." (Circuit Court Opinion, R. 203.)

"There have been very many such reorganizations since the statute in similar form was first enacted; and there have been numerous decisions holding reorganizations (involving this feature) nontaxable, without discussion of the point. See Coleman v. Commissioner, 81 F. (2d) 455, 456; G. & K. Mfg. Co. v. Commissioner 76 F. (2d) 454 (C. C. A. 4) (reversed 296 U. S. 389, and remanded to Board of Tax Appeals); Starr v. Commissioner, 82 F. (2d) 964 (C. C. A. 4); cert. denied, 298 U. S. 680; Watts v. Commissioner, 75 F. (2d) 981 (C. C. A. 2), affd. 296 U. S. 387; Tulsa Oxygen Co. v. Commissioner, 18 B. T. A. 1283; Frank Keel, 31 B. T. A. 212; National Pipe & Foundry Co. v. Commissioner, 19, B. T. A. 242; Fashion Center Building Co. v. Commissioner, 31 B. T. A. 167; Baar & Morris, Hidden Taxes in Corporate Reorganizations, p. 261. Cf. Dickey v. Commissioner, 32 B. T. A. 1283, and Brons Hotels, Inc. v. Commissioner, 34 B. T. A. 376 (six Commissioners dissenting). Furthermore the contention now advanced is contrary to the adminis-

trative practice for more than ten years, under the statutes so worded and several times re-enacted. (United States v. Hermanos, 209 U. S. 337; Helvering v. Bliss, 293 U. S. 144, 151)." (District Court Opinion R. 175).

Respondent very earnestly submits, and certainly the view uniformly prevailing hitherto has been, that the manifest scheme of the reorganization statute (Section 112, Revenue Act of 1928, *supra*) is to exempt the selling corporation in a "reorganization" from *any* tax or "gain" involved therein except to the extent expressly specified in the statute. Applying that conception of the statute to the situation here, the entire transaction was non-taxable to Hendler Company except to the extent of any "other property or money" *received* by Hendler Company and not *distributed* to its stockholders. All other items of gain were by both the intent and the language of the statute excluded from taxability to Hendler Company. Otherwise stated, every item of gain in a "reorganization" within the definition of the statute is non-taxable except "other property or money" *received* by the transferee corporation, and not *distributed* to its stockholders. Admittedly Respondent distributed all the property and money it received, pursuant to the plan of reorganization.

The Petitioner's representatives *concede* that although the "profit" realized, had this transaction been treated and taxable as a *sale*, was over $6,000,000.00, yet because of the *reorganization* provisions of the revenue laws, at least the far greater part of this profit is "non-recognizable". See H. Reg. No. 179, 68th Cong., 1st Sess., pp. 13-16.* The Commissioner did not consider the profit

*Excerpt from this report in Appendix, p. 26.

recognizable to the extent even of the full amount of *obligations assumed*,—he excluded not only the other "cash" liabilities of $1,180,410.78, but the value to Hendler of the "relief" from other of its obligations assumed by Borden,—taking into account *only* this one "bonded debt" obligation.

As matter of fact, the *actual* "profit", on a "sale" basis was not merely $6,608,712.65, as estimated by the Commissioner, but at least $7,789,124.43. The Commissioner failed to include in his "sale price" the $1,180,410.78 of *other* cash liabilities, likewise assumed (R. 109, 156). And if a calculation could be made of the value of the still other contracts and current debts assumed, the "profit" would be still greater.

By both the courts below Petitioner's then counsel were asked, but were unable, to explain Commissioner's failure to assess these *other* "debts assumed". In their brief in this Court counsel do not even refer to this inconsistency.

Prior to the Revenue Act of 1924 the existing law did not provide that even a "merger", in the type of case here presented, should be treated not as a "*sale*" but as a *non-taxable* or "statutory reorganization". The necessity for including it among those already made non-taxable by the Act resulted in the amendment in the Act of 1924 and continued in the Act of 1928.*

It is very earnestly submitted that Congress clearly intended to make possible, mergers such as this without

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* See quotations from Report of House Ways and Means Committee, 1924 when the pertinent provisions of the reorganization statute were revised and adopted. Also "Statement of the Changes in the Revenue Act of 1921 by the Treasury Department, and the Reasons Therefor" prepared for the use of the Ways and Means Committee, by A. W. Gregg, Special Assistant to the Secretary of the Treasury (Appendix, *infra* pp. 26-29).

any "profit tax" resulting, and must necessarily therefore have intended to exclude "assumption of liabilities" as a taxable item of "profit", *because no reorganization of a going business in this manner could be effected without involving the taking over by the transferee not merely of the cash liabilities, but of all other existing obligations, of the transferor corporation.*

What Congress did and intended to do by the enactment of Section 112 (d) of the Revenue Act of 1928 was to make non-taxable a reorganization in which "other property or money" was received and distributed, and in any event to make such a transaction taxable, only to the extent of "other property or money" actually *received* and *not distributed.* To interpret this sub-section otherwise would defeat the very purpose intended.

See Committee Reports Appendix pp. 26-29.

The theory of counsel for Petitioner in the District Court was that "assumption of debts" is *expressly* taxed as "other property". In the C. C. A. a directly opposite theory was advanced by different counsel, — that the item of "obligations assumed" is taxable because *there is no operative provision in the statute that specifically exempts such an item.* As both Courts below pointed out, this is a mere begging of the question whether the assumption by Borden of this liability, or *any* such liability of transferor, in a *reorganization,* within the definition of the statute, is "income" in the usual sense. The question here is not whether generally such an item constitutes "income", but what is the proper construction and intent of this particular section of the law.

The Commissioner in *Western Industries Co. v. Helvering,* 82 F. (2d) 461, 462, maintained that the transaction in that case was a *sale* and not a *reorganization* because

to bring it within the statutory definition of a "reorganization" there must have been:

(1) An agreement between the two corporations to combine their enterprises;

(2) The continued participation of the stockholders of the combining corporations;

(3) The *assumption* by the surviving corporation of the *liabilities* of the old company; and

(4) The dissolution of the transferor corporation.

This quotation of the Commissioner's contention in that case shows clearly that the view of the Commissioner has been that "assumption of liabilities" in a "reorganization" under Section 112 is not only a usual feature but indeed a necessary factor within the intention of the Section and, therefore, was not intended to be treated as either "income" to the corporation, or "other property and money" received by the corporation and necessary to be distributed in order to exempt the transferor corporation, a party to the reorganization, from gain.

And certainly the uniform *practice* of the Department, which not only this Respondent but other taxpayers had every justification to rely upon as its "interpretation" of the Statute, has been hitherto in accordance with that view. See Judge Chesnut's opinion (R. 175). While counsel protest (their brief p. 13) that the assertions to this effect of the courts below are not supported by *published rulings*, they do not deny that such has been the uniform *practice*,—a practice followed by the Commissioner in the *instant* case (for as seen, the one item of "debts" *here* assessed by him was assessed on a very different theory).

Quite apart from this controlling question, of the *intent* of the Statute, looking at the situation from a practical and common sense point of view, Respondent submits that *in reality Hendler Company itself* never actually received anything of *actual* value to it in this assumption by Borden, which was at most an agreement to protect Hendler against its creditors and other obligees. Such an agreement in no way *really* added to the protection which Hendler already had, in the liability which all the assets were then under *in any event* for the payment of debts, by operation of law. Some of these debts were secured by an express mortgage, but even the so-called unsecured debts had in practical effect an equal claim against the assets. The Sales-In-Bulk Act of Maryland, of which the Court takes judicial notice, expressly provides that the transferee of all the assets takes them subject to the claims of creditors. The item of $534,297.40 is therefore on no different basis from that of the other debts subject to which Borden took over the Hendler assets, and the value of these assets *exceeded by $8,000,000 the debts so secured.* Hence certainly no added "protection" was needed, or was of substantial value.

Indeed, it might well be argued that even such "benefit" as this entailed, enured automatically to Hendler stockholders, rather than to Hendler itself. After receiving the stock of Borden, Hendler without waiting for or without regard to the question of the performance by Borden of its assumption of Hendler debts, distributed to its stockholders all that it then had remaining, namely, the stock of Borden which it had received in exchange for all its assets. As soon thereafter as possible it was formally dissolved. Of course, such dissolution could not operate to the prejudice of Hendler creditors.

but they could follow the assets into the hands of the Hendler stockholders if their debts were not paid. In fact, that is what occurred in this very case, where the Government proceeded against the stockholders to collect the tax on the Hendler Company now in dispute. While Borden did not assume *this* debt, yet had *other* Hendler creditors, being unable to secure payment by Borden, similarly made demand on the Hendler stockholders for payments of *their* debts, unquestionably the Hendler stockholders could have invoked against Borden this direct obligation of assumption by Borden, although in form made with the Company and not with the stockholders, so that to all intents and purposes this assumption to the extent that it had value *was* distributed to and passed on for the benefit of the Hendler stockholders; that is to say, when there was distributed to them the Borden stock there was in effect by operation of law also distributed the agreement of Borden to protect against Hendler debts.

Such a view is suggested in a late work on the subject, —"Baar and Morris—Hidden Taxes in Corporate Reorganizations", Section 17, page 267.

While this suggestion of "Baar and Morris" is supported by very logical reasoning, in no sense does Respondent rely or find it necessary to rely, upon the soundness of such a theory. It is referred to because at least it illustrates the difficulty of treating such an intangible character of "benefit", as "other property or money received" by Hendler.

Petitioner further implies that had Borden paid Hendler direct the money with which it paid its own

debts, rather than Borden paying Hendler creditors direct, the "gain" would have been recognized; and that "assumption of debts" is a mere change of *method*, but not of *substance*.

Respondent very confidently replies that this is far from being a mere optional "change in method". A merger of "going businesses' cannot as a practical matter be effected by the process of transferee paying the transferor and letting it (the latter) itself discharge its debts. Many such debts are not yet matured or certainly owing and *cannot* then be paid.

Indeed the *amount* of many such may depend on future events. Just as *unperformed contracts* of the transferor must in such case be taken over by transferee, resulting in a possible "relief or gain" to transferor almost impossible to estimate in figures, so *current obligations* changing from hour to hour, and necessarily uncertain in amount, must likewise be taken over.

The recently decided case of *Minnesota Tea Company vs. Helvering, supra,* illustrates the difference between a "statutory reorganization" involving actual merger of *businesses* and one involving merely a transfer of *assets*.

In the Minnesota Tea Company case, *supra,* there was, in fact, no "merger" *of going businesses.* The Tea Company, in actual effect, merely transferred to the transferee a large part of its *physical* assets, at market value and *free of debts,* and retained its separate corporate existence. The transferee there assumed none of the corporate debts, contracts or obligations of the transferor, who consequently, in order to enable it to pass clear title in connection with the physical assets so sold or transferred, had to provide for the dis-

charge itself of all its own obligations. In no sense, as in the instant Hendler-Borden merger, did the transferee take the place of and practically become the substitute for or successor of the transferor. Hence the purchase price consisted in part of stock of the transferee, and in part of cash sufficient to enable the transferor to discharge these obligations. And there could at once be *definitely* determined the exact amount of "cash received and not distributed" by the Tea Company.

In the instant case, on the contrary, there was a complete merger not only of two companies but of *two going businesses*. Borden absorbed not only every asset of every kind of Hendler but every right, privilege and existing contract of Hendler, and in connection with this took over and assumed *every existing obligation* of Hendler, including not only its money debts but all its existing contracts and obligations of every kind. While, of course, the agreement of merger had to be based upon a "balance sheet" of Hendler, which at the time of consummation would remain *substantially* unchanged, necessarily, as contracts were being made and discharged from day to day, and even from hour to hour, it was agreed that changes in so-called "current obligations" should not be taken into account,—Borden was to get, and did get, *whatever* Hendler *then* owned and to assume, and did assume, as its *own* obligations *whatever* obligations Hendler *then* was under. See the contract (R. 3-22) and Chattel Deed (R. 151-155).

Apart from any other consideration, the very *impossibility of determining* the value to the transferor of mere "assumption of obligations", where a *going business* of the transferor is taken over, itself explains why Congress did not attempt to tax such. If the Government

counsel are right in their contention that the value to transferor of "relief from obligations" is ordinary taxable "income", not covered by the reorganization sections at all, then the value of *all* such relief,—not merely *part*,—is equally "taxable gain". Not merely in this case would the "bonded debt", "bank debt", and "merchandise debt" be the measure. *Other* debts "incurred in the regular course of business" would have to be calculated. Also the various *contracts* and *leases* taken over would have to be appraised,—some of the latter might well have been extremely onerous to Hendler. Borden assumed among other obligations Hendler's contingent liability to *damage* claims, as to certain types of which Hendler had no liability insurance (R. 13). Moreover, it might be an indefinite time in the future before the actual value of such "assumption of obligations" could be determined,—leaving the "tax liability" of transferor impossible of *then* ascertainment. Certainly a "gain" which is to be "taxable income" of a company going into a merger and then into dissolution should be gain the *exact amount* of which is ascertainable. It is not sufficient that *part* is ascertainable, otherwise the dissolving company might have to wait indefinitely before knowing *how much* tax it is required to pay.

Very confidently it is submitted that Congress could not have intended to bring about such an impracticable situation as would be entailed if all such items had to be valued and "taxable income" predicated upon them.

As has been seen, not only both of the Courts below but the Commissioner himself, as shown not only by his action in the instant case but by his similar action or at least acquiescence in all other cases until counsel advanced a contrary theory in this case, were clearly of the

opinion that it was the intent of the reorganization provisions of the Revenue Act to exempt the transferor in a reorganization from any tax except as to items expressly specified in said provisions. They were further clearly of the opinion that the items so specified are "other property or money received and not distributed" (to stockholders) and that the mere benefit to the transferor resulting from the transferee taking over the property subject to indebtedness or even expressly assuming such indebtedness of the transferor was not intended to be and is not either "other property or money" within the meaning of the statute,—that is to say, that these words mean things that not only can be physically or actually *received* by the transferor but which also are susceptible of *distribution* by the transferor.

Even Petitioner's counsel apparently agree that the theoretical gain resulting from "assumption of debts" *is not susceptible of distribution,*—as they say in their brief, page 12, "it is difficult to see how there could be any distribution of that income to any one, etc." Their contention, therefore, means that Congress intended that it should be utterly impossible ever to effect a complete merger of two going businesses in which the transferee takes over completely not only all assets but all current obligations of the transferor, without entailing the immediate recognition of "taxable gain" to the transferor to the extent of the value to it of this assumption of its obligations; because on their own admission such *cannot* be distributed, whether to creditors or to stockholders. They try to fortify such a strained and unnatural construction of the statute by saying in their brief, page 7:

> "A contrary conclusion in the present case would operate to give Hendler a permanent exemption from

> taxation of this income rather than a mere postponement of tax, which is all that the reorganization provisions were intended to accomplish."

And, page 12:

> "While those provisions were meant to facilitate the readjustment of corporate structure by easing the tax burden, they were plainly intended at most to postpone the incidence of the tax."

They of course do not mean this literally because certainly as to the Hendler *Corporation* there *is* a "permanent exemption" and not a mere "postponement" of a tax which would otherwise have been payable by it on the *admittedly* "non-taxable gain" (R. 109) resulting to Hendler from the transaction, and certainly also it is not *that same* tax which is either "postponed" or even passed on to some one else. Assuming, however, that what they mean is that Congress supposed and intended that there would thereafter be opportunity to tax some other taxpayer on all theoretical gain resulting both to the Hendler Corporation and to its stockholders from the transfer of the Hendler business and assets to Borden, certainly Congress did not anticipate or believe that the tax or taxes thus postponed and ultimately collectible would bear any real relation to the tax of which the transferor is thus relieved. For example, by providing that taxable gain to the Hendler stockholders, instead of being recognizable when their Hendler shares were liquidated by the distribution to them of the Borden shares, should be recognizable only when the Borden shares were ultimately disposed of, many new factors were brought in which necessarily would make the ultimate tax a far different one. Not only when the respective stockholders sell their Borden shares might the selling price be either much greater or much less than

the market value at the time of the merger, but the then actual status and income of the different stockholders might be very different, with resulting effect upon their rate of tax; and, of course, also the then rates of income tax might be very different. Little force, therefore, it is submitted attaches to the mere argument that "otherwise the Government will lose in tax". But, furthermore, it by no means follows that in the enactment of these provisions it was either foreseen or supposed that non-inclusion of "assumption of liabilities" in the "other property or money" which, unless "distributed", should be *then* recognizable taxable gain, would result in a permanent exemption of such gain. It is far more likely that it was supposed and intended that any theoretical taxable gain which was not either assessable to the transferor or passed on at least in some degree to the transferor's stockholders would become and remain subject to tax in the hands of the transferee. In a merger of this kind, in which the transferee takes over literally everything of the transferor,—both all its assets and its rights and all its liabilities and obligations,—the transferee substantially to that extent steps into the place and shoes of the transferor. Indeed, that has since been expressly covered by the enactment in the Revenue Act of 1936 of Section 113 (a) (7)* (see foot-

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*ADJUSTED BASIS FOR DETERMINING GAIN OR LOSS.—Sec. 113 (a) [Revenue Act of 1936]. Basis (unadjusted) of property.—The basis of property shall be the cost of such property; except that— * * *

(7) TRANSFERS TO CORPORATION.—If the property was acquired after December 31, 1917, by a corporation in connection with a reorganization, then the basis shall be the same as it would be in the hands of the transferor, increased in the amount of gain or decreased in the amount of loss recognized to the transferor upon such transfer under the law applicable to the year in which the transfer was made. This paragraph shall not apply if the property acquired consists of stock or securities in a corporation a party to the reorganization, unless acquired by the issuance of stock or securities of the transferee as the consideration in whole or in part for the transfer.

note) providing that the basis of the transferee as to the assets so acquired shall be the same as that of the transferor, increased only to the extent that taxable gain was recognized to the transferor. Even should it be argued that this is applicable only to reorganizations consummated since the enactment of this section, it certainly shows what was always assumed, that is to say, that any theoretical gain not specifically covered in the reorganization provisions would still remain subject to tax when the same assets were later disposed of by the transferee. Of course, the amount of such tax might be very different, but, as has been shown, similarly the amount of the tax in any event would be very different.

CONCLUSION.

Again it is respectfully emphasized that outstanding throughout this litigation is the fact that this was a "genuine merger". The transaction here involved was based on no mere motive to avoid a tax and involved no step even suggesting an effort at such, or which was not a natural and indeed necessary one, totally regardless of any "income tax" question. In the outcome *all* the assets and *all* the obligations of all these companies became vested in one company rather than in several, and Hendler stockholders have merely exchanged their holdings in the smaller Hendler Company for holdings of supposedly corresponding value, of the one consolidated company, operating, on a larger scale, the same kind of business.

It is submitted upon the principles and authorities cited that L. Manuel Hendler, Respondent, is entitled to recover the amount sued for by him, $69,554.69 with interest thereon from date of payment, less $6,260.33 with in-

terest thereon from the date same was payable, which is $62,145.89, together with interest thereon from April 15, 1933, according to law. The decisions below should be affirmed.

Respectfully submitted,

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APPENDIX.

*H. Rep. No. 179, 68th Cong. 1st Sess. pp. 13-16:

"The provisions of Section 203 of the bill that no gain or loss is recognized from certain exchanges do not grant an exemption and are not so intended. These provisions are based upon the theory that the type of exchanges specified in Section 203 are merely changes in form and not in substance, and consequently should not be considered as effecting a realization of income at the time of the exchange. In other words, those provisions result not in an exemption from tax but in a postponement of tax until the gain is realized by a pure sale or on such an exchange as amounts to a pure sale."

*S. Rep. No. 398, 68th Cong. 1st Sess., pp. 14-15:

"Paragraph (3) provides that no gain or loss is recognized if a corporation a party to a reorganization exchanges property for stock or securities in another corporation a party to the reorganization. There is no corresponding provision of the existing law, although this paragraph embodies the construction placed by the Treasury Department upon the existing law. The present ruling of the Treasury Department on this question is of doubtful legality and a statutory provision is most necessary.

"Congress has heretofore adopted the policy of exempting from tax the gain from exchanges made in connection with a reorganization in order that ordinary business transactions will not be prevented on account of the provisions of the tax law. If it is necessary for this reason to exempt from tax the gain realized by the stockholders, it is even more necessary to exempt from tax the gain realized by the corporation."

*H. Rep. No. 179, 68th Cong. 1st Sess. p. 13:

"It appears best to provide generally that gain or loss is recognized from all exchanges and then except specifically and in definite terms those cases of exchange in which it is not desired to tax the gain or allow the loss. This results in definiteness and accuracy and enables a tax-payer to determine prior to the consummation of a given transaction the tax liability that will result therefrom."

*H. Rep. No. 179, 68th Cong. 1st Sess., p. 15:

"There is no provision of the existing law which corresponds to subdivision (d) of the Bill, nor has the Treasury Department ever ruled officially on the type of case covered by that subdivision. The subdivision provides that if a corporation in connection with a reorganization transfers its assets to another corporation a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss (sic) to the transferor is recognized, if it distributes the cash to its stockholders. But if the selling corporation fails to distribute the cash to its stockholders, then the gain or loss (sic) is to be recognized. In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is to be recognized, but if it retains all or any part of the proceeds with the result that the transaction is in substance a real sale, then all or part of the gain shall be recognized."*

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* These are excerpts from reports made with respect to the bill that became the Revenue Act of 1924, which contained for the first time the provisions of the law involved. Section 208 of the Act of 1921 became Section 112 of the Act of 1928.

** "Statement of the Changes in the Revenue Act of 1921 by the Treasury Department and the Reasons Therefor, prepared for the use of the Ways and Means Committee, by A. W. Gregg, Special Assistant to the Secretary of the Treasury."

"Section 203 (e): There is no provision of the existing law which corresponds to sub-division (e) of the Bill, nor has the Treasury Department ever ruled officially on the type of case covered by that sub-division. The sub-division provides that if a corporation in connection with a reorganization transfers its assets to another corporation, a party to the reorganization, for stock and securities of the same corporation and cash, then no gain or loss to the transferor is recognized, if it distributes the cash to its stockholders. But if the selling corporation fails to distribute the cash to its stockholders, then the gain or loss is to be recognized. In other words, if the corporation which sells its assets in connection with the reorganization acts merely as a conduit in passing the proceeds of the sale on to its stockholders, no gain to the corporation is recognized, but if it retains the entire amount of proceeds with the result that the transaction is in substance a real sale, then the gain shall be recognized."

"A corporation, in connection with a reorganization may dispose of its assets in one of three ways: It may transfer them to a new corporation in exchange for stock or cash; it may transfer them to the new corporation, the consideration being the payment by the new corporation of stock or cash to the stockholders of the old corporation, or, the new corporation may buy, with its stock and cash, from the stockholders of the old corporation, their stock and then liquidate the old corporation. If a corporation adopts the first method, its gain from the sale could be taxed. If it adopts the second method, the gain probably could be taxed on the theory of construc-

tive receipt by the selling corporation. If it adopts the third method, there is no theory on which any gain to the old corporation could be taxed. As a result of these considerations, sub-division (e) has been so drafted that the tax liability of the selling corporation is the same, no matter which of the three methods, set out above, is adopted. In other words, if the selling corporation is a mere conduit through which the consideration for the sale of the assets passes, or, if the consideration for the sale of the assets is paid direct to the stockholders of the old corporation, without passing through the conduit, no gain or loss to the old corporation is recognized, and the same result is reached that would have to be reached necessarily if the transaction were accomplished through the medium of a purchase by the new corporation of the stock of the old corporation followed by a liquidation of the old."

** This statement is set out in *Minnesota Tea Company v. Commissioner*, 34 B. T. A. 145.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937.

No. 563.

UNITED STATES OF AMERICA,
Petitioner,

vs.

L. MANUEL HENDLER, AS TRANSFEREE OF CREAMERIES, INC., ETC.,
Respondent.

PETITION FOR REHEARING.

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Counsel for Respondent.

Of Counsel:
BARTON, WILMER, BRAMBLE, ADDISON & SEMANS.

The Daily Record Co. Print, Baltimore.

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L. MANUEL HENDLER, as Transferee of Creameries, Inc., Etc.,

Respondent.

PETITION FOR REHEARING.

L. Manuel Hendler, Transferee, Etc., the Respondent in this case, respectfully petitions this Court for a rehearing of said cause.

The judgment of this Court, reversing the judgments below, was entered March 28, 1938, and this petition, in compliance with Rule 33, is filed within twenty-five (25) days thereafter.

GROUNDS SUBMITTED FOR REHEARING.

1. A rehearing of this case is in the interest of the Government as much as in that of the business community. The far-reaching consequences of the decision

are emphasized by the many communications received by Respondent urging that the Court be asked to grant a rehearing of the case.

2. The Court treated this case as involving only and controlled by the question decided in the recent case of Minnesota Tea Company vs. Helvering, 302 U. S. —. It is respectfully submitted that not only were the facts in the two cases very different but the reasons further assigned in the opinion in the instant case were not the reasons assigned for the decision in the Minnesota Tea case.

In that case the only question presented and decided was whether moneys admittedly actually received by the transferor, and which admittedly would be taxable gain unless distributed to stockholders, could escape such tax by being nominally "distributed" to stockholders on agreement that it be by them immediately redistributed to creditors.

3. In the instant case the moneys were undeniably never received by the transferor, but were paid direct to the creditors by Borden, the substituted debtor. Of course, in estimating the difference between original cost and transfer valuation of the assets, assumption of the transferor's debts in this as in all such cases represents a "benefit" to the transferor such as is spoken of in the opinion, resulting to the transferor from such assumption, although that benefit is not received from the transferee, who gives in exchange its stock only to the extent of the value of the equity received. The question is not whether there is in all such transactions the "benefit" above referred to but whether under the various provisions of the Revenue Act relative to reorganizations of

different kinds the value of such benefit inevitably represents taxable income to the transferor.

Not only the Respondent's brief but the opinions of both Courts below set out many reasons and cite many authorities in support of the view that such was not intended and that otherwise the very purpose of these provisions would be thwarted. Moreover, even the Government does not deny that the uniform practice heretofore in all such cases has been contrary to the view that such does involve taxable income.

4. The opinion in effect lays down the rule that if there is a benefit (which Respondent, of course, does not deny) then such is necessarily taxable income because not in express terms exempted in the statute. On this principle every type of reorganization contemplated in the statute would inevitably involve taxable income.

Without repeating the many illustrations given in the brief and in the opinions of the Courts below Respondent respectfully suggests the following:

(a) *A mere change of Charter.*

A corporation of State A transfers all its assets, obligations and business bodily to a corporation of State B, the mere purpose being to change the State of incorporation. Inevitably to the extent of gain on all obligations thus transferred the corporation becomes liable for income tax.

(b) *Incorporation of business.*

An individual or a partnership incorporates its business, transfers the business as an entirety, and issues stock representing the equity. Inevitably such individual or partnership becomes liable for income

tax on gain resulting from the debts and obligations so assumed.

(c) *Reorganization under Section 77B.*

A struggling corporation, being reorganized under Section 77B of the Bankruptcy Act, transfers its entire assets, debts and business to a new corporation. Inevitably the already embarrassed corporation becomes liable also for income tax to the extent of gain on the obligations so transferred.

In none of these cases, any more than in the instant case, do the provisions of the Revenue Act covering such transactions in express terms provide that no such "gain" shall be taxable. Hence the principles announced in the opinion in the instant case involve the results above set forth.

It is again very earnestly submitted that the very purpose of these sections was to make possible these transactions without involving tax, and the various amendments from time to time made were designed to accomplish the same result, although the method adopted differed from that first covered in the statute, of a mere exchange of stock for stock.

Respectfully submitted,

RANDOLPH BARTON, JR.,
JOSEPH ADDISON,
WILLIAM R. SEMANS,
Counsel for Respondent.

Of Counsel:

BARTON, WILMER, BRAMBLE, ADDISON & SEMANS.

CERTIFICATE.

I, RANDOLPH BARTON, JR., one of the attorneys for respondent in the within entitled action, hereby certify that the foregoing Petition is, in my judgment, well founded and is not interposed for delay.

RANDOLPH BARTON, JR.,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES.

No. 563.—October Term, 1937.

United States of America, Petitioner, *vs.* L. Manuel Hendler, as Transferee of Creameries, Inc. (Formerly Hendler Creamery Co., Inc.). } On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[March 28, 1938.]

Mr. Justice Black delivered the opinion of the Court.

The Revenue Act of 1928[1] imposed a tax upon the annnal "net income" of corporations. It defined "net income" as "gross income . . . less the deductions allowed . . .", and "gross income" as including "gains, profits and income derived from . . . trades . . . or sales, or dealings in property, . . . or gains or profits and income . . . from any source whatever."[2]

Section 112 of the Act[3] exempts certain gains which are realized from a "reorganization" similar to, or in the nature of, a corporate merger or consolidation. Under this Section, such gains are not taxed if one corporation, pursuant to a "plan of reorganization" exchanges its property "solely for *stock* or *securities*, in another corporation, a party to the reorganization." But, when a corporation not only receives "stock or securities" in exchange for its property, but also receives "other property or money" in carrying out a "plan of reorganization,"

"(1) If the corporation receiving such other property or money *distributes* it in pursuance of the plan of reorganization, no gain to the corporation shall be recognized from the exchange, but

"(2) If the corporation receiving such other property or money *does not distribute* it in pursuance of the plan of reorganization, the gain, if any, to the corporation shall be recognized [taxed]; . . . ."

[1] Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 13.
[2] *Id.*, Sec. 21-22.
[3] *Id.*, Sec. 112.

In this case, there was a merger or "reorganization" of the Borden Company and the Hendler Creamery Company, Inc., resulting in gains of more than six million dollars to the Hendler Company, Inc., a corporation of which respondent is transferee. The Court of Appeals, believing there was an exemption under Section 112, affirmed[4] the judgment of the District Court[5] holding all Hendler gains non-taxable.

This controversy between the government and respondent involves the assumption and payment—pursuant to the plan of reorganization—by the Borden Company of $534,297.40 bonded indebtedness of the Hendler Creamery Co., Inc. We are unable to agree with the conclusion reached by the courts below that the gain to the Hendler Company, realized by the Borden Company's payment, was exempt from taxation under Section 112.

It was contended below and it is urged here that since the Hendler Company did not actually receive the money with which the Borden Company discharged the former's indebtedness, the Hendler Company's gain of $534,297.40 is not taxable. The transaction, however, under which the Borden Company assumed and paid the debt and obligation of the Hendler Company is to be regarded in substance as though the $534,297.40 had been paid directly to the Hendler Company. The Hendler Company was the beneficiary of the discharge of its indebtedness. Its gain was as real and substantial as if the money had been paid it and then paid over by it to its creditors. The discharge of liability by the payment of the Hendler Company's indebtedness constituted income to the Hendler Company and is to be treated as such.[6]

Section 112 provides no exemption for gains—resulting from corporate "reorganization"—neither received as "stocks or securities", nor received as "money or other property" and distributed to stockholders under the plan of reorganization. In *Minnesota Tea Co.* v. *Helvering*, 302 U. S. —, it was said that this exemption "contemplates a distribution to stockholders, and not payment to creditors." The very statute upon which the taxpayer relies provides that "If the corporation receiving such other property or money does not distribute it in pursuance of the plan of reorgani-

[4] 91 F. (2d) 680; cert. granted, — U. S. —.

[5] 17 Fed. Supp. 558.

[6] Old Colony Trust Co. v. Comm. of Int. Revenue, 279 U. S. 716, 729. Douglas v. Willcuts, 296 U. S. 1, 8, 9.

zation, the gain, if any, to the corporation shall be recognized [taxed] . . . ."

Since this gain or income of $534,297.40 of the Hendler Company was neither received as "stock or securities" nor distributed to its stockholders "in pursuance of the plan of reorganization" it was not exempt and is taxable gain as defined in the 1928 Act. This $534,297.40 gain to the taxpayer does not fall within the exemptions of Section 112, and the judgment of the court below is

Reversed.

Mr. Justice CARDOZO and Mr. Justice REED took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.